Central Law Journal.

ST. LOUIS, MO., NOVEMBER 30, 1900.

Mr. E. C. Brandenburg, in charge of bankruptcy matters at Washington, has made a detailed report on the operation of the new bankrupt act during the past year. The wonderful popularity of the act is attested by the fact that over twenty thousand petitions were filed disclosing liabilities amounting to over two hundred and sixty-four million dollars, the assets amounting to over thirty-three million dollars. All classes of people seem to have taken advantage of the act, and its provisions in nearly every particular have sustained successfully the closest investigation of the courts. The only section Mr. Brandenburg states which as construed by the courts is meeting with almost universal disapproval is section 57g. The construction referred to is evidently the case of *In re* Fixen, 102 Fed. Rep. 295, to the importance of which decision this journal was among the first to call attention, in its issue of November 9th. This case held that payments on account in the ordinary course of business, made within four months preceding bankruptcy, was a preference, and under section 57g must be surrendered before the balance of the claim of the creditor to whom such payment has been made can be proved and allowed. In this connection we desire to call attention to the more recent case of *In re* Jones, reported in 4 Am. B. R. 563, in which it is held that section 57g compels a surrender of a preferential payment of money, even though received more than four months prior to bankruptcy, as a condition precedent to sharing in the assets. The only comment necessary is that, if the construction announced in the case of *In re* Fixen will unsettle business, the construction announced in the case of *In re* Jones will be even more dangerous by disturbing transactions long since past. Our intention is not to criticise these decisions; they are the only logical construction that could be placed on the plain wording of this much disputed section. Judge Lowell's advice, however, in the case of *In re* Jones is both timely and sensible: "If the construction thus put upon section 57g makes it a real menace to legitimate business, concerning which no opinion is expressed, it is from congress that relief must be sought."

Quite an interesting exception to the doctrine of contributory negligence was set forth very clearly by the Supreme Court of Illinois, in the recent case of West Chicago Street Railway Co. v. Liderman, 58 N. E. Rep. 367. A mother accompanied by her infant child met a friend on the street and stopped a few moments to engage in conversation. During the interview she unconsciously let go of the child's hand, and a moment later saw it upon the street car track and a car approaching at great speed. She immediately ran to the child, and throwing herself in front of the car, was injured in her attempt to rescue it. The question is whether the mother was guilty of contributory negligence in thus throwing herself in front of the car, especially so, when she has carelessly permitted the child to wander upon the track. On the first point the court quotes with approval from Eckert v. Railroad Co., 43 N. Y. 502: "The evidence showed that there was a small child upon the track who, if not rescued, must be inevitably crushed by the rapidly approaching train. This, deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril if he could do so without incurring great danger to himself. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it unless made under such circumstances as to constitute rashness in the judgment of prudent persons." Of course, there is an exception to the rule just stated, to the effect that if the person attempted to be rescued was placed in a position of danger through the fault of the person injured the danger will not excuse the attempt to save him. See Railway Co. v. Leach, 91 Ga. 419. The court recognized this exception but distinguished it from the present case by showing that in all the cases in which this exception is announced there was upon the part of the injured party something more than mere passive negligence, in most cases an affirmative act in taking the person rescued into a place of imminent danger, as where a party wrongfully takes a child upon the trestle work of a railway and was killed while attempting to save it from

injury by an approaching train. In answer to the second point of the question, the court, after stating the rule that it was not negligence *per se* to permit infants to be upon the streets unattended, proceeded as follows: "Parents are chargeable with the exercise of ordinary care in the protection of their minor children; and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from fifteen to twenty minutes without satisfying herself of its whereabouts was, under all the circumstances, a want of ordinary care, was, we think, a fairly debatable question. * * * Her own evidence shows that she held the child by the hand, and that it slipped away from her only for a moment, and that she immediately pursued it. Can the court say, as a matter of law, that she was bound to hold the child in her arms, or hold it by the hand, or keep her eyes on it constantly while upon the street? The question was, therefore, one of fact, and proper to be submitted to a jury. She had a right reasonably to presume that, if the child for the time escaped from her, and became exposed to danger, others would not negligently injure it; and seeing it suddenly so exposed, she had the right, and it was her duty, not only to the child, but to the defendant itself, to make all reasonable efforts to rescue it from that danger."

NOTES OF IMPORTANT DECISIONS.

CORPORATIONS—FOREIGN CORPORATIONS—STATE REGULATION—VALIDITY OF CONTRACTS—COMMERCE.—In Diamond Glue Co. v. United States Glue Co., decided by the U. S. Circuit Court, E. D. Wisconsin, it was held that a statutory enactment within the power of a State, which prohibits the transaction of business therein by foreign corporations except upon compliance with certain conditions, invalidates any contract entered into in violation of the statute so that the contract cannot be enforced by any court administering the law in such State; and where the prohibition is plain, this rule governs equally, with or without express terms, in the statutes declaring the invalidity.

It appeared that a State statute prohibited any foreign corporation from transacting any business in the State without first complying with its requirements as to the filing a copy of its charter, etc., and further provided that any contract made by such a corporation affecting its personal liability or relating to property in the State before compliance should be wholly void on its behalf, but enforceable against it. After the enactment of such statute, but before it went into effect by its terms, a foreign corporation entered into an executory contract to be performed within the State. It was held that the statute, on taking effect, became applicable to anything done or to be done under the contract by such corporation thereafter, and constituted a defense to an action by the corporation for a breach of the contract by the other party by refusing to continue operations under it, such corporation having failed to comply with the requirements of the statute.

It was further held that a contract to operate a factory and market the product on joint account is not one relating to interstate commerce in a constitutional sense, so as to exempt it from the operation of State laws, merely because the article manufactured is largely sold in other States.

JUDGMENTS — LIMITATIONS OF ACTIONS — JUDGMENTS OF OTHER STATES. — Const. U. S. art. 4, § 1, declares that full faith and credit shall be given in each State to the records and judicial proceedings of every other State. Gen. St. p. 1974, § 8, provides that no action on a contract without specialty shall be brought after six years from the accrual of such cause of action. It was held by the Supreme Court of New Jersey, in Little v. McVey, that where an action was brought on judgments rendered in the State of New York more than six years prior to the action, there being no statute of limitations relative to the judgments of sister States, the action was not barred, since, under Const. U. S. art. 4, § 1, a judgment of a sister State cannot be regarded as a contract debt. The court says:

"This is an action upon two judgments recovered in 1888 in the Supreme Court of the State of New York. Several pleas were filed to the declaration on the judgments, but the only one called in question on this motion is the last, which states 'that the several alleged causes of action in the declaration mentioned did not, nor did any or either of them, accrue to the plaintiff at any time within six years next before the commencement of this suit.' This sets up as a defense to the action on the judgments sued on our statute of limitations applicable to debts founded on simple contracts. That suits upon judgments of a sister State are governed by the *lex fori*, and not by the *lex loci contractus*, in so far as proceedings touching the remedy to recover on such judgments are concerned, is without question. Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228. This whole subject is discussed in the case of McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177, and the cases above cited follow it. There the court construes the provision of the constitution of the United States which relates to the faith and credit to be given by one State to the judgments of the courts of another State, and says:

'What is the nature of a plea of the statute of limitations? Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy. Consequently the *lex fori* must prevail.' In this State there is no statute of limitations which specifically provides for the length of time within which suit must be brought upon a judgment of a sister State, and unless the eighth section of our statute of limitations can be pleaded to a suit upon such a judgment, and is applicable to such suits, this plea is bad. Gen. St. p. 1974, § 8. There are a number of States which have statutes of limitation as to suits upon such judgments, and where such statutes exist the Supreme Court of the United States has sustained them, and held that it was within the power of one State to provide that a suit upon a judgment of a sister State must be brought within a certain period of years. The statute of Georgia was, as construed in McElmoyle v. Cohen, above cited, as follows: 'That actions of debt on judgments obtained in courts, other than the courts of this State, must be brought in five years after the judgment is obtained.' And the court upheld that statute, as within the legislative authority of a State, and not interdicted by the faith and credit clause of the federal constitution. To the same effect is Bank v. Dalton, 9 How. 522, 13 L. Ed. 242, and Bacon v. Howard, 20 How. 22, 15 L. Ed. 811. In our own State it has been held that in a suit upon a foreign judgment (that is, a judgment recovered in the dominion of Canada, where the constitutional provision which relates to the faith and credit to be given to the judgments of a sister State does not apply), a plea of our statute of limitations is good, because such foreign judgment possesses no higher character than a simple contract debt, and hence is barred by the same period of limitations as contract debts. Bank v. Ramsey, 55 N. J. Law, 383, 26 Atl. Rep. 837. The judgment of a sister State is not a foreign judgment. It will have the same faith and credit here as in the State where it may have been rendered, and will be deemed conclusive evidence of the debt merged in it. The judgment of a sister State excludes all controversy in this State as to the merits of the debt and contract upon which the judgment is founded. A judgment of a sister State cannot be treated here as a simple contract debt, but must be considered as a debt of record and a verity. Such a judgment is not the mere *prima facie* evidence of a debt. It must be deemed conclusive evidence of the debt.

"One of the leading cases in this country on this question is Andrews v. Montgomery, 19 Johns. 162. In this State our supreme court, as long ago as 1832, in passing upon a plea of the statute of limitations interposed to a suit upon a judgment obtained in the court of common pleas of the county of Northampton, in the State of Pennsylvania, said, by Ewing, C. J.: 'Our statute for the limitation of actions upon contracts cannot be brought to bear upon the present demand. Nor have we any statute which in express terms prescribes a period within which actions upon the judgments of other States must be commenced. We have a statute comprehending judgments, but it is confined in terms to judgments of this State.' Gulick v. Loder, 13 N. J. Law, 68. The statute construed by the court in this last case, and which was pleaded by the second plea demurred to, was that which limits the right to bring an action to twenty years. The effect of the decision in Gulick v. Loder is that there is no statute of limitations at all in this State which can be pleaded in bar of a suit upon a judgment of a sister State. The court says in Gulick v. Loder, however, that in such suits it is possible, under a plea of payment, to give evidence that the judgment of the sister State has existed for more than twenty years, and that a presumption arises, from such length of time alone, of payment, but not by virtue of the statute; the principle evidently being that, upon proof that no demand or attempt to enforce the judgment of a sister State has been made within twenty years, that in itself is evidence that the judgment has been paid, and casts the burden upon the plaintiff to establish the contrary before a recovery can be had. In the absence of a statute of limitations applicable to suits upon judgments of a sister State, the courts of this State are required to give to such judgments the same faith and credit, and rights of action thereon, to the same extent as are given to our own judgments; and the language of our statute with reference to our own judgments is: 'A judgment in any court of record in this State may be revived by *scire facias*, or an action of debt may be brought thereon within twenty years next after the date of such judgment, and not after.'

"The plea in this case, in my judgment, is without substance in law, and raises purely and solely a legal question, in view of the admission in the declaration that the judgments sued on were recovered more than six years before the action was instituted, and the motion to strike out should be granted. An order will be made accordingly."

MUNICIPAL CORPORATION—CONTRACT—MONOPOLIES.—In City of Atlanta v. Stern, it was held by the Supreme Court of Georgia, that a municipal corporation, though not required by its charter to let contracts for public work to the lowest bidders, and though clothed, as to such matters, with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class. Such an ordinance is *ultra vires* and illegal, because it tends to encourage monopoly and defeat competition, and all contracts made in pursuance thereof are void. The court said:

"This court, in Semmes v. Mayor, etc., 19 Ga.

471, held that 'a body corporate is not answerable for an erroneous exercise of a discretion, though the consequences be injurious,' and that 'inadequacy of price, unless so great as, of itself, to be evidence of fraud, is not a sufficient ground for impeaching' a contract for the sale of property belonging to a city. In Wells v. Mayor, etc., 43 Ga. 67, it was decided that, where a municipal corporation is acting within the scope of its powers, a court will not 'interfere to restrain or control its action on the ground that the same is unwise or extravagant,' and that, 'to sustain such interference, it must appear either that the act is *ultra vires*, or fraudulent, or corrupt.' Again, in Danielly v. Cabaniss, 52 Ga. 212, it was ruled that 'when a town council is authorized by law to do a particular act at its discretion, the courts will not control this discretion, and inquire into the propriety, economy, and general wisdom of the undertaking, or into the details of the manner adopted to carry the project into execution.' The case of Mayor, etc., v. Eldridge, 64 Ga. 524, is on the same line, and there are many others in which this court has made decisions of similar import. The doctrine of all these cases, viz., that, as a general rule, there should be no judicial interference with the exercise by municipal bodies of the discretion with which they are by law invested, is sound and well recognized; but this rule is not absolutely without exception. The whole subject was given thorough consideration in the case of City of Atlanta v. Holliday, 96 Ga. 546, 23 S. E. Rep. 509, in which, after stating that 'under the charter of the city of Atlanta the discretion of its municipal authorities, within the sphere of their powers, is very broad, and this discretion is to be exercised according to the judgment of the corporate authorities as to the necessity or expediency of any given measure,' it was held that: 'Where these authorities are acting within the scope of their duties, and exercising a discretionary power, the courts are not warranted in interfering, unless fraud or corruption is shown, or the power or discretion is being manifestly abused to the oppression of the citizen. In a case where it clearly appears that a threatened act on the part of the municipal authorities will result in such oppression, a court of equity may interfere to prevent the wrong.' The vice of the ordinance now under consideration is that it cuts off the power to fully and freely exercise that very discretion which the public good requires the mayor and general council to exercise in making contracts. It effectually ties their hands, and prevents their availing themselves of opportunities to make advantageous agreements in behalf of the city which it is idle to say would not be presented were this ordinance out of the way. We cannot, therefore, escape the conclusion that in adopting this ordinance the mayor and general council exceeded their authority. In 1 Spell. Extr. Relief, § 718, it is said: 'Where no conditions or restrictions are imposed upon municipal officers in the matter of letting contracts, they are not obliged to let the work to the lowest bidder, and cannot be enjoined for a refusal to do so, unless guilty of fraud. They may exercise an unlimited discretion so long as they are not guilty of gross abuse of discretion, and do not pervert their powers to such an extent as to amount to a fraudulent misappropriation of the public funds.' It is interesting, in this connection, to notice the case of Avery v. Job, 25 Oreg. 512, 36 Pac. Rep. 293, in which it was ruled that: 'Although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will, at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers.' Here, then, we have most respectable authority for the proposition that a municipal act which amounts to a refusal to exercise discretion, and which must result in an arbitrary waste of the public funds, 'is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers.' Is not such waste sure to occur when, out of nineteen printing concerns in Atlanta, only four are allowed to compete for the city's work, and would not a combination of these four (which could most probably be effected without much difficulty) certainly create a monopoly? If the four should combine, there would be no competition whatever. It was urged in the argument that, if such a thing should occur, the ordinance could and would be speedily repealed. To this we reply that the combination might be made without the knowledge of the municipal authorities; but, aside from this, they ought at all times to be in a position to meet such an emergency without being compelled to resort to further legislation; and, further, whether such a combination is to be anticipated or not, they have no more right to restrict competition than to defeat it altogether.

"The case of Adams v. Brenan, 177 Ill. 194, 52 N. E. Rep. 314, 42 L. R. A. 718, is in many respects similar to the one in hand. It was there held that 'a board of education has no power to agree with the representatives of labor organizations to insert in all its contracts for work upon school buildings a provision that none but union men should be employed in such work, or placed upon its pay rolls.' We make two pertinent extracts from the opinion of Mr. Justice Cartwright: 'It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition, and to increase the cost of work. It is unquestionable that, if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board, as the agency of the State in the management of school affairs in the city of Chicago,

to adopt such a rule, or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the State. If such a restriction were sought to be enforced by any law of the State, it would constitute an infringement upon the constitutional rights of citizens, so that the State in its sovereign capacity, through its legislature, could not enact such a provision.' Pages 199, 200, 177 Ill., page 316, 52 N. E. Rep., and page 720, 42 L. R. A. 'There is another ground upon which complainant has an undoubted right to maintain the bill, and that is that the contract tends to create a monopoly, and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to lessen competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work; and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract.' Pages 201, 202, 177 Ill., page 316, 52 N. E. Rep., and page 721, 42 L. R. A. In Holden v. City of Alton, 179 Ill. 318, 53 N. E. Rep. 556, which was a case of identically the same kind as ours, except that there the city charter required the contracts to be let to the lowest bidders, it was decided that an ordinance like the one now under review was 'illegal, as tending to create a monopoly, and impose an additional burden on taxpayers.' While, of course, the provision as to letting contracts to the lowest bidders was a matter of consequences, an examination of the opinion, which was delivered by the same justice from whom we quoted above, will leave little room for doubting that the decision would and ought to have been the same, even in the absence of such a provision.

"There are, besides the foregoing, numerous other authorities which support our conclusion in the present case. We cite, as more or less in point, the following: Beach, Monop. § 125; 2 Beach, Inj. § 1299; City of Chicago v. Rumpff, 45 Ill. 90; Littler v. Jayne, 124 Ill. 123, 16 N. E. Rep. 374; Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455; Railroad Co. v. Smith, 29 Ohio St. 292; Van Reipen v. City of Jersey City, 58 N. J. Law, 262, 33 Atl. Rep. 740; Oakley v. City of Atlantic City (N. J. Sup.), 44 Atl. Rep. 651; Winkler v. Summers (Sup.), 5 N. Y. Supp. 723. Most of the authorities cited in this opinion are also pertinent upon the proposition that in a case like the present the taxpayer has the right to invoke an injunction. Our case of Peeples v. Byrd, 98 Ga. 688, 25 S. E. Rep. 677, relied on by counsel for the plaintiffs in error, is in entire accord with what we now decide. There the supreme court reporter was in fact exercising a discretion. Here the corporate authorities sought to put themselves in a place where they could not do so at all, or else within very narrow limits. Judgment affirmed."

STATUTES ARE UNCONSTITUTIONAL WHICH IMPOSE THE COST OF A PUBLIC IMPROVEMENT UPON ADJACENT LANDS ACCORDING TO THE FRONTAGE OR AREA THEREOF WITHOUT ANY REFERENCE OR LIMIT TO THE EXTENT OR RATIO OF SPECIAL BENEFIT THERETO.

II.

To the former article[1] should be added other decisions since found, which follow,[2] and do not follow,[3] the Norwood case.[4]

Sec. 1. The assessments involved in the California and New York recent decisions noted were for street pavement. These courts, like the courts of Michigan and Missouri, accept the view of the public contractors, that the decision in the Norwood case does not apply, because the assessment involved in the Norwood case was made to pay for a street opening and not for a street pavement. It is through this hole, which is not a hole, they each escape or rather attempt to escape. They overlook or else will not see, that it was distinctly and only because of the unconstitutionality of the provision in the Ohio statute, authorizing the assessment in question, that the Supreme Court of the United States in the Norwood case declared the assessment void. No special rule was invoked or proclaimed in the Norwood case, because of the facts therein. As before shown the case was decided upon the general principle that a statute which authorizes the assessment of adjacent land to pay the cost of a public improvement, according to the frontage or area of such land, without any reference to the special benefit thereto, was unconstitutional.[5] The dissenting State decisions cite Spencer v. Merchant[6] and Parsons v. District of Co-

[1] 51 Cent. L. J. 243.

[2] Dexter v. Boston (Mass.), 57 N. E. Rep. 379; Parker v. City of Detroit, 103 Fed. Rep. 357; Bidwell v. Huff, *Id.* 363.

[3] Conde v. City of Schenectady (N. Y.), 58 N. E. Rep. 130; Hadley v. Dague (Cal.), 62 Pac. Rep. 501; Barber Asphalt Paving Co. v. Ess, decided Nov. 13, 1900, Mo. Sup. Ct.

[4] Norwood v. Baker, 172 U. S. 269.

[5] 51 Cent. L. J. 244.

[6] 125 U. S. 355.

lumbia[7] as impeaching the ruling in the Norwood case, as applied to street paving and sewers. The rulings in these cases were not overlooked, but they and every other decision of the court upon the subject were expressly mentioned and received mature consideration in the Norwood case.

Sec. 2. To at once remove the case of Parsons v. District of Columbia as not a legitimate an authority in favor of the legality the front foot or area rule of assessmen of land under State authority, it is only necessary to be reminded that the fourteenth amendment has no limitations upon the national government. There is no guarantee of equal protection of the law in the District of Columbia or in the territories against congressional action. Judge Cooley says: "Congress, as to municipalities within the territories and the District of Columbia, might doubtless give larger powers of taxation than could be conferred by the States."[8] Probably the only limitation upon the power of congress to tax in the District of Columbia and the territories is that the tax shall be for public use. Every constitutional government is thus limited, if not in express terms, by necessary implication. Otherwise the many and their property could be taxed for, and transferred to, the private uses of the few.[9] With this great power to tax and exempt from taxation, congress could (if it would) place the whole burden and cost of running the city of Washington upon the persons and property on one side of Pennsylvania avenue.[10] It could impose general municipal taxes on land as per the front foot or area thereof; on cattle *per capita;* on furniture and jewelry, etc., per article, which it could not do, if the federal constitution required, as State constitutions now do, that private property should be taxed *ad valorem*, also uniformly throughout the territorial limits levying taxes, and that no one year's tax could exceed a limited per cent. of the assessed value of the property.[11]

Sec. 3. With such limitations upon a State as those noted and the fourteenth amendment to the constitution of the United States, the imposition of the entire cost of a public improvement upon adjacent lands is void as a tax; such imposition can be sustained only to an amount equal to the exceptional benefit, the property assessed receives or will receive from the improvement, that is, such benefit as is not common to other property not assessed, within the limits of the public agency imposing the assessment.[12] In Violette v. Alexandria[13] the Virginia court says: "Strike out the element of benefit and a special assessment loses its foundation." In Newby v. Platte Co.[14] the Supreme Court of Missouri said: "When the taxation is against one in respect to his property, as property, when he is assessed for a property tax, the assessment must be according to the value of the taxed property; but here the property is assessed in respect to the benefit he derives from the improvement; it is a tax on the benefits rather than on the property, and, therefore, is not obnoxious to the constitutional prohibition we are now considering." In Morrison v. Morey[15] the Missouri court said of such an assessment: "As a tax it would be unconstitutional, because not uniform (Const. sec. 3, art. 10), and because not in proportion to the value of the property (Const. sec. 4, art. 10), and because it is prohibited by the limitations of section 12, article 10 of our constitution, but being an assessment of benefits, and in no sense a tax, it is a constitutional exercise of the power of the State." In the authorities cited it is made clear that exceptional benefit is the basis and limit of

[7] 170 U. S. 45.

[8] Cooley on Taxation (2d Ed.), 344.

[9] Cole v. LaGrange, 113 U. S. 1.

[10] Cooley on Const. Lim. (6th Ed.) 591, 632 and 87; The People v. Mayor, 4 N. Y. 425, 426; Municipality No. 2 v. White, 9 La. Ann. 449-450.

[11] Taxation on Mining Claims, 9 Colo. 635; Newby v. Platte Co., 25 Mo. 271, 272; Morrison v. Morey, 146 Mo. 564; Holbrook v. Dickinson, 46 Ill. 285; Reelfoot Levee Dist. v. Dawson, 97 Tenn. 152; Cooley on Taxation (2d Ed.), 625, 626.

[12] See authorities cited in Norwood v. Baker, 172 U. S. 269. See also N. Y. & Gulf Ry. Co. v. Kearney, 55 N. J. L. 471; Newby v. Platte Co., 25 Mo. 271 *et. seq.;* Kansas City v. Morton, 117 Mo. 446; Morrison v. Morey, 146 Mo. 564; Hancom v. Omaha, 11 Neb. 41; Crain v. Omaha, 42 Neb. 120; Cribbs v. Benedict, 64 Ark. 559, 560, 561; People v. Daniels, 6 Utah, 288. Crane v. West Chicago Park Commrs., 153 Ill. 348; Burrough on Taxation, secs. 39 and 145; Cooley on Taxation (2d Ed), 606; McKee v. Town of Pendleton (Ind.), 57 N. E. Rep. 532; Sperry v. Flygare (Minn.), 83 N. W. Rep. 177; Norfolk v. Ellis, 23 Gratt. (Va.) 241; Violette v. Alexandria, 92 Va. 579. See, also, authorities *post* in notes 27 and 28.

[13] 92 Va. 579.

[14] 25 Mo. 272. See also St. Louis v. Farrar, 80 Mo. 388.

[15] 146 Mo. 564.

the right to charge private property with the cost of a public improvement imposed upon only a small portion of the property within the territorial limits of the public agency imposing the tax, and that the benefits so assessable are only those that are in excess of benefits that are common to other property not assessed for the improvement. Judge Dillon has likewise expressed the principle or standard of such assessments: "The assessments may be made upon all property specially benefited by the particular improvement, according to the exceptional benefit each lot or parcel of property actually and separately receives."[16]

Sec. 4. The public contractors and their attorneys ask, What figure does the fourteenth amendment cut in the proposition? This question may be answered as it has been answered as follows: First. States are forbidden thereby to deny any person within its jurisdiction the equal protection of the laws. This provision is a limitation upon the taxing power of States and every State agency, and it requires uniformity in the enactment and in the administration of State tax laws.[17] "It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible."[18] Upon what principle can the assessment of the entire cost of a public improvement against adjacent lands (thereby leaving unassessed all other property in the limits of the municipal agency imposing the assessment) be justified? Obviously, only when the property assessed receives, or will receive, benefits peculiar thereto, and which equal the amount with which it is assessed. Says the Supreme Court of the United States: "The mere fact of classification is not sufficient to relieve the statute from the reach of the equality clause of the fourteenth amendment, and in all cases it must appear, not merely that the classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the classification, and is not a mere arbitrary selection."[19] The first essential of all taxation is that it must be for a public use.[20] A special assessment against property to pay for the cost of an improvement not made for a public use is void, though the benefit to the private property assessed be equal to the cost of the improvement.[21] And a legislative act is void which authorizes or permits local improvements to be made at the cost of adjacent land which does not limit the exercise of such authority to the public use or the public necessity.[22] When there is no other constitutional provision to protect private property from taxation, except for public use, it is protected by the general guarantee of "due process of law" contained in the State and federal constitutions.[23] Since the improvement must be for the public use or public necessity to justify a tax either general or special, it is not a reasonable classification to charge lands in a small district of a city for a public improvement, and thereby exempt the balance of the property in the city from any taxation for the improvement, and it would be a denial to the owners of the lands assessed an equal protection of the law, unless the lands assessed receive a benefit from the improvement not received by the property in the city not assessed, and in an amount equal to the amount of the assessment.[24] Second. The guarantee of "due process of law" in the fourteenth amendment forbids the taking of private property for public use by eminent domain or by taxation

[16] Dillon, Munic. Corp. (4th Ed.) sec. 761.

[17] The Railroad Tax Cases, 13 Fed. Rep. 722; R. R. and Telephone Cases v. Board of Equalization, 85 Fed. Rep. 303; Nashville, etc. R. R. Co. v. Taylor, 86 Fed. Rep. 169.

[18] R. R. Tax Cases, 13 Fed. Rep. 733.

[19] Gulf, Colo., etc. Ry. v. Ellis, 165 U. S. 150.

[20] Cole v. LaGrange, 113 U. S. 1; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 158-167.

[21] Scuffletown Fence Co. v. McAllister, 12 Bush (Ky.), 312; Anderson v. The Kerns Drainage Co., 14 Ind. 202; Deisner v. Simpson, 72 Ind. 441; Tillman v. Kircher, 64 Ind. 155; Morrison v. Morey, 146 Mo. 561-2; Coster v. Tidewater Co., 18 N. J. Eq. 55; Macon v. Patty, 57 Miss. 337; Butler v. Supervisors, 26 Mich. 22; The People v. Salem, 20 Mich. 542; *In re* Market St., 49 Cal. 546; *In re* Ryer, 72 N. Y. 8; *In re* Jacobs, 98 N. Y. 111.

[22] Nickey v. Stearns, Ranchoe Co., 126 Cal. 150, 58 Pac. Rep. 459; *In re* Theresa Drainage Dist., 90 Wis. 301; Atty.-General v. City of Eucleir, 37 Wis. 401; Reeves v. Treasurer Wood Co., 8 Ohio St. 333, 346; Cypress Pond Draining Co. v. Hooper, 2 Metc. (Ky.) 350; *In re* Tuthill, 163 N. Y. 133, 57 N. E. Rep. 308.

[23] Stratton Claimants v. Morris Claimants, 89 Tenn. 501, 535; Robinson v. Swope, 12 Bush (Ky.), 22; *In re* Tuthill, 163 N. Y. 133; *In re* Jacobs, 98 N. Y. 111; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 158-167; Mo. Pac. Ry. Co. v. Nebraska, *Id.* 403.

[24] Garrett v. St. Louis, 25 Mo. 512; Kansas City v. Morton, 117 Mo. 446; Newby v. Platte Co., 25 Mo. 259; Bauman v. Ross, 167 U. S. 581; Sanborn v. Comrs., 9 Minn. 261; State v. Garbroski (Iowa), 82 N. W. Rep. 959; Cache Co. v. Jensen

without just compensation.[25] In Cole v. LaGrange, the Supreme Court of the United States held and said: "So far as respects the use, the taking of private property for taxation is subject to the same limit as taking by right of eminent domain. Each is a taking by the State for public use."[26] The just compensation required for private property taken for public use may be paid to the owner wholly or in part by taxing him with all exceptional benefits to his land adjacent to that appropriated to the public use, to the extent of peculiar benefits thereto not common to other lands in the vicinity.[27] But as held by the Supreme Courtof the United States, and in the decisions of State supreme courts just cited in this section upon like constitutional provisions, it is made clear that for the property specially taxed, as well as for property taken, the owner is entitled to "just compensation," and that just compensation for an assessment of the entire cost of a public improvement upon the adjacent lands in both instances, consists, and can consist, only in an exceptional benefit to the property assessed, equal to the amount of the assessment. Moreover, "legislative acts authorizing the taking of private property for public use are unconstitutional, unless they provide the owner with a proper remedy to obtain a just compensation."[28] The Supreme Court of the United States has said; "due process of law must be found in the State statute."[29]

Sec. 5. Enforcing the rule of "exceptional benefits" as the fundamental basis and limit of the right to make such special assessments, or as the requisite just compensation for such assessments, State statutes conferring the power to make special assessments, as by the front foot, area, or assessed value of the land, which do not limit the amount of such assessment to the amount of exceptional benefit the property assessed receives, or will receive, from the improvement, have been held void, because authorizing the taking of private property for public use without just compensation and without due process of law; also, a denial of the equal protection of the law in violation of the State and federal constitutions.[30]

Sec. 6. Another line of authority in Missouri, California, North Dakota, and other States, while conceding exceptional benefits to the property assessed, as the principle, and only principle, upon which the assessment of the cost of a public improvement thereon can be sustained, holds that this basis of benefit is only hypothetical; that it is not essential to the validity of these assessments that any actual or real benefit be required; that when the statute authorizes an improvement to be made at the cost of adjacent land, as per the front foot or area thereof, and an improvement is made under such authority, that it is to be conclusively assumed that the improvement was necessary and was made for the public use; also, that the cost of the work assessed against the adjacent lands is not in excess of the amount of exceptional benefits to the lots or parcels of property assessed.[31]

(Utah), 61 Pac. Rep. 303; State v. Julow, 129 Mo. 164; State v. Walsh, 136 Mo. 400; State v. Thomas, 138 Mo. 95, 101; *In re* Flukes (Mo.), 57 S. W. Rep. 547; St. Louis v. Heitzberger, 141 Mo. 376; City of Plymouth v. Schuthiers, 135 Ind. 339. See also authorities cited in notes 17, 18 and 19, *ante*.

[25] Chicago, Burlington, etc. R. R. v. Chicago, 166 U. S. 239. See also Staton v. R. R. Co., 111 N. Car. 282; Parham v. Justices, 3 Ga. 341 *et seq.*; *Ex parte* Martin, 13 Ark. 198; Harness v. Chesapeake Canal Co., 1 Md. Ch. 248.

[26] 113 U. S. 8. See also Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 160, 161 and 166; Scott v. Toledo, 36 Fed. Rep. 385; *In re* Tuthill, 163 N. Y. 133, 57 N. E. Rep. 303; Bradshaw v. Omaha, 1 Neb. 38; City v. Larned, 34 Ill. 203; Millett v. People, 117 Ill. 295; Davis v. Crutchfield, 145 Ill. 313; Seers v. Street Comrs., 173 Mass. 352, 353; St. Charles v. Nolle, 51 Mo. 124; Wells v. Weston, 22 Mo. 388, and authorities in Norwood v. Baker, 172 U. S. 269. *Contra:* Keith v. Bingham, 100 Mo. 300.

[27] Newby v. Platte Co., 25 Mo. 259; Dougherty v. Brown, 91 Mo. 26; Kansas City v. Morton, 117 Mo. 446; Bauman v. Ross, 167 U. S. 581; Cooley, Const. Lim (6th Ed.) 702.

[28] Walther v. Warner, 25 Mo. 277; State v. Glen, 7 Jones Law (N. Car.), 321; Gardner v. Village of Newburgh, 2 Johns. Ch. 162; City v. Larned, 34 Ill. 203; City v. Spencer, 40 Ill. 211; Norfolk v. Ellis, 26 Gratt. (Va.) 242; Dillon, Munic. Corp. (4th Ed.) sec. 615; Cooley, Const. Lim. (6th Ed.) 692.

[29] Castillo v. McConinco, 168 U. S. 683.

[30] N. Y., G. L. Ry. Co. v. Kearney, 55 N. J. L 471; Holbrook v. Dickinson, 46 Ill. 285; Lee v. Ruggles, 62 Ill. 427, and cases cited; Crane v. West Chicago Park Comrs., 153 Ill. 348; Weed v. Boston, 172 Mass. 28; Ulman v. City of Baltimore, 72 Md. 594; Norfolk v. Ellis, 26 Gratt.241; Violette v. Alexandria, 92 Va. 561; People v. Jeff. Co. Ct., 65 N. Y. 604; McKee v. Town of Pendleton (Ind.), 57 N. E. Rep. 532; Sperry v. Flygare (Minn.), 83 N. W. Rep. 177; Reelfoot Levee Dist. v. Dawson, 97 Tenn. 152. See, also, and particularly the Nebraska, Arkansas, Utah and Missouri decisions cited in notes 12 and 24, *ante*; also causes decided since the Norwood case cited in former article, 51 Cent. L. J. 243.

[31] Webster v. City of Fargo (N. Dak.), 82 N. W. Rep.

While upholding such assessments on the theory of exceptional benefits, the cases cited in support of this line of authority show that the assessment is really sustained as a tax imposed under a supposed sovereign legislative power of the State; thus in Missouri, where the rule of benefit is recognized in theory as the only basic principle upon which these assessments can be sustained, it is, nevertheless, held that assessments of the entire cost of a public improvement upon adjacent lands, according to their frontage, are to be sustained under a statute which authorizes such assessments, though the land assessed in fact received no benefit, but injury, from the improvement for which it is assessed.[32] As further illustrative of the arbitrary character of the front foot rule prescribed in the statute, and of the entire absence therein of any reference to the extent of the benefit to, or the ratio of benefit as between the parcels of land assessed, each strip of land fronting on the improvement is assessed at the same sum per front foot, whether the strip have a depth of five feet or one hundred and fifty feet, or the same be a different depth than other lots assessed.[33] The North Dakota and California courts are likewise indifferent to the amount and any requirement of actual benefit of the improvement to the property assessed. A hypothetical special benefit being ascribed by these courts to the legislative mind as the consideration for the imposition of these assessments, though there is not one word in the statute as to benefit (the statute imposing the cost of the improvement against the lands assessed arbitrarily, according to the front foot or area thereof).[34] No ruling of statutory construction can be cited that will uphold this view of a statute so wholly barren of an expressed idea of benefit. Such statutes are uniformly construed with strictness.[35] It might as truly be asserted that a legislative imposition of taxes by the front foot, or area thereof, for general revenue, was a legislative determination (and therefore conclusive), that the frontage or area of such lands was the taxable value thereof. This we know to be wholly untrue. Besides, legislative taxation by the front foot, or area, of lands has been declared by the courts unwarranted and illegal legislation where there is a constitutional provision requiring property to be taxed according to its value;[36] and no more can a statute authorizing a special assessment for local improvements, by the front foot or area of the lands assessed, be construed as based upon special benefit, or as a legislative determination that the property was so assessed because of special benefit.[37] Of what value to the owner of land specially assessed, is the principle of special benefit, if it may be ignored at the pleasure of the State legislature?

The California case cited says: "The principle upon which the expense is charged on the property in that district is that the property has received a particular benefit. But, as was said by Mr. Justice Temple in Lent v. Tillson, 72 Cal. 438: 'The benefit is not the source of the power.' Now, suppose we take as a text, for a few observations, the excerpt from this case, "the benefit is not the source of the power."[38] While the benefit is not the source of the power, it is the conceded principle in all lines of authority upon which these assessments are justified and maintained. The value of property is not the source of the power for its taxation, but in the State of Missouri, and other States, there is a provision that property shall be taxed according to its value. This provision in the organic law of the State makes the value of property the principle upon which all taxes for general revenue shall be imposed. While this principle, the value of property, is not the source of power for its taxation, as shown by the authorities cited,

732; Heman v. Allen (Mo.), 57 S. W. Rep 559; Hadley v. Dague, 62 Pac. Rep. 501.

[32] Keith v. Bingham, 100 Mo. 300; Moberly v. Hogan, 131 Mo. 19; McQuiddy v. Smith, 67 Mo. App. 205.

[33] Clopton v. Taylor, 49 Mo. App. 117; Crane v. French, 50 Mo. App. 367.

[34] Webster v. City of Fargo (N. Dak.), 82 N. W. Rep. 732; Hadley v. Dague (Cal.), 62 Pac. Rep. —.

[35] Cooley on Taxation (2d Ed.), 276.

[36] Holbrook v. Dickinson, 46 Ill. 285; Taxation on Mining Claims, 9 Colo. 635; Newby v. Platte Co., 25 Mo. 271, 272; Morrison v. Morey, 146 Mo.564; Reelfoot Levee Dist. v. Dawson, 97 Tenn. 152; Cooley on Taxation (2d Ed.), 625, 626.

[37] People v. Jeff. Co. Ct., 55 N. Y. 604; Lee v. Ruggles, 62 Ill. 427; Creote v. Chicago, 56 Ill. 422; St. John v. City, 50 Ill. 92; N. Y., G. L. Ry. Co. v. Kearney, 55 N. J. L. 47; Jersey City v. Vreeland, 43 *Id.* 638; Vreeland v. Jersey City, *Id.* 135; Kersten v. Milwaukee (Wis.), 81 N. W. Rep. 849. See, also, authorities cited in Norwood v. Baker, 172 U. S. 269.

[38] See cases cited in note 31.

it cannot be ignored by even the legislature of the State in imposing taxes on private property. No legislative act can be upheld which imposes taxes on land per its frontage or area, on cattle *per capita*, or on furniture or jewelry per article, in any State which contains a provision in its constitution requiring property to be taxed according to its value, on any theory or assumption that the amount of taxes imposed by the legislature for general revenue on land per the frontage or area, on cattle *per capita*, on articles of furniture and jewelry per article, is a legislative determination that the amount of taxes so imposed represent taxes according to the value of the property. The reason why such a legislative act would be held unconstitutional is that it ignores the fundamental principle, the value of property, as the standard for its taxation.[39]

In the authorities cited *pro* and *con* on the subject of special assessments, the asserted and conceded principle on which they are maintained, is that the improvement made is of exceptional benefit to the lands assessed. This exceptional benefit is as well understood to be the standard limit for special assessments as the value of property is understood to be the standard limit for general taxation. It necessarily follows, as held in the Norwood case, that a statute violates the law of the land which authorizes the arbitrary imposition of the cost of a public improvement upon adjacent lands according to frontage or area, because the assessment therein authorized is not limited to the amount of exceptional benefit of the improvement to the lands assessed.

The limited space of a single article has been exhausted. The writer hopes to add a short article upon the subject at an early date, the substance of which will be that the principle and controlling error in the premise of the Missouri courts, and others of that line of decisions, is in the assumption that the ratio and extent of special assessments that may be imposed upon adjacent lands to pay for a public improvement are (like the creation of a taxing district) wholly legislative functions.

Kansas City, Mo. R. H. FIELD.

[39] See authorities in note 36.

GUARANTY—NOTICE OF ACCEPTANCE AND ADVANCEMENTS—INSOLVENCY OF PRINCIPAL—DEMAND FOR PAYMENT.

GERMAN SAV. BANK v. DRAKE ROOFING CO.

Supreme Court of Iowa, Oct. 15, 1900.

1. An instrument reciting that, to induce a certain bank to extend credit to a named principal, the signers guaranty to the bank the payment of all indebtedness which may accrue from the principal to the bank within a certain time, not exceeding a certain sum, for which there is no consideration, except the future advances to be made, and which is not signed at the bank's request or in its presence, is a mere offer of guaranty requiring notice of acceptance by the bank to bind the guarantors.

2. In an action on a guaranty for the payment of all indebtedness accruing to a bank from a certain principal within a certain time, the principal's insolvency from the making of the guaranty down to the commencement of the suit is sufficient excuse for not giving notice to the guarantors of the advancements, or of the state of the account at the expiration of the guaranty.

3. In an action on a guaranty for the payment of all indebtedness accruing to a bank from a certain principal, demand and notice of non payment are not essential to a recovery.

DEEMER, J.: The Drake Roofing Company was engaged in the business of gravel roofing in the city of Des Moines. Prior to October 2, 1895, it had been doing business with plaintiff, a banking corporation in the same city. Wishing to branch out in its business, the roofing company, through its secretary, J. F. N. Drake, applied to the bank for further accommodations, by way of loans, to enable it to buy materials in larger quantities and at better rates. The secretary did not wish to furnish sureties every time he called for a loan, and a guaranty was agreed upon. The attorney for the bank prepared the instrument, which was as follows, to-wit: "For the purpose of inducing the German Savings Bank, of Des Moines, Polk county, Iowa, to extend credit to the Drake Roofing Company, the undersigned, J. F. N. Drake, F. O. Drake, A. P. Cottrell, and R. T. C. Lord, hereby guaranty to the said German Savings Bank payment of all notes, checks, drafts, overdrafts, and other evidences of indebtedness which may accrue from the said Drake Roofing Company to the said German Savings Bank within six months from the date of this guaranty, not to exceed the sum of five hundred dollars, it being the intention of this contract to secure payment to the said German Savings Bank; and the undersigned hereby agree to pay to the said German Savings Bank all notes, checks, drafts, overdrafts, and other evidences of indebtedness from said Drake Roofing Company to said German Savings Bank which may accrue within six months from the date hereof, not to exceed five hundred dollars, waiving demand, notice, and protest on the part of the said German Savings Bank in collecting said sums from said Drake

Roofing Company." The secretary took this to the defendants, who signed it, and he (the secretary) returned the same to the bank. A few days after the delivery of the instrument the roofing company was allowed to overdraw its account to the extent of $500. Thereafter, and about the time the bank's quarterly statement was due, it requested the roofing company to make a note for $500, to cover that amount of the overdraft. The request was granted, and on the 5th day of November, 1895, the roofing company, through its secretary, executed and delivered a demand note for the sum of $500, payable to the bank. This note was renewed on February 10, 1896, and again on April 1, 1896,—each time by a demand note bearing 8 per cent. interest, and providing for attorney's fees. No notice of the acceptance of the guaranty, or of advances made thereon, was ever given the defendants. At the time of the transactions in question the Drake Roofing Company was insolvent, and, as it failed to pay the last renewal note, this action was brought on that note, and the instrument of guaranty hitherto set out. The defenses have already been stated, and, as they are each and all relied on, they will be considered in the order in which they were set out.

When defendants signed the letter of guaranty, the Drake Roofing Company was not indebted to the plaintiff. The advancements were made by the bank after the delivery of the instrument of guaranty, and the primary question is, was notice of the acceptance of the guaranty necessary? The authorities relating to this question are in hopeless conflict, and, although some of the rules are fairly well settled, there is a want of harmony in the decisions applying them to special circumstances. When the guaranty is a letter of credit, or an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom the application for credit is made, the decided weight of authority is that the guarantor must within a reasonable time be notified of the acceptance of the guaranty. But they differ more or less in determining what is a guaranty and what an offer to guaranty. Two very satisfactory and conclusive reasons are given for this general rule. The first is that the so-called guaranty is a mere offer or proposition, and is not complete until the party making the offer is notified of its acceptance, when the minds of the parties meet, and the contract is completed. The second is that the party making the offer is entitled to know whether or not his offer has been accepted, that he may know his responsibility, and so regulate his course of conduct toward the principal debtor that he may not suffer loss. See, as supporting the rule, Edmondston v. Drake, 5 Pet. 624, 8 L. Ed. 251; Douglass v. Reynolds, 7 Pet. 113, 8 L. Ed. 626; Lee v. Dick, 10 Pet. 482, 9 L. Ed. 503; Adams v. Jones, 12 Pet. 207, 9 L. Ed. 1058; Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686; Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. Rep. 173, 29 L. Ed. 480; Claflin v. Briant 58 Ga. 414; Taylor v. McClung, 2 Houst. 24; Tuckermann v. French, 7 Greenl. 115; Kellogg v. Stockton, 29 Pa. St. 460; Cincheloe v. Holmes, 7 B. Mon. 5; Allen v. Pike, 3 Cush. 238; Mussey v. Rayner, 22 Pick. 223; Rankin v. Childs, 9 Mo. 673; Mayfield v. Wheeler, 37 Tex. 256; McCollum v. Cushing, 22 Ark. 540; Geiger v. Clark, 13 Cal. 579; Cooke v. Orne, 37 Ill. 186; Oaks v. Weller, 13 Vt. 106; Steadman v. Guthrie, 4 Metc. (Ky.), 147; Kay v. Allen, 9 Pa. St. 320; Beebe v. Dudley, 26 N. H. 249. In Douglass v. Howland, 24 Wend. 35, Justice Cowen wrote an elaborate opinion entirely repudiating the doctrine of notice as necessary to the consummation of the contract; but that has not been generally followed and has been doubted, if not overruled, by Jackson v. Griswold, 4 Hill, 522. See, also, Beekman v. Hale, 17 Johns. 140. There are a few cases that seem to hold a guaranty relating to future advances binding, although no notice of acceptance is given the guarantor. These decisions are opposed to the great weight of authority, and we are not inclined to follow them. See Whitney v. Groot, 24 Wend. 82; Wright v. Griffith, 121 Ind. 478, 23 N. E. Rep. 281, 6 L. R. A. 639; Bank v. Coster's Ex'rs, 3 N. Y. 303; Lonsdale v. Bank, 18 Ohio, 126; Yancey v. Brown, 3 Sneed, 89. But even here the conflict is more in the application of principles to particular facts than in the principles themselves. The difficulty seems to be in distinguishing between an absolute guaranty and a mere offer to, or proposal of, guaranty. In some cases it is held that notice of acceptance must be given the guarantor even though his promise be absolute in terms. Chief Justice Marshall so held in Russell v. Clarke's Ex'rs, 7 Cranch, 69, 3 L. Ed. 271. Judge Story appears to have been of the same opinion. See Cremer v. Higginson, 1 Mason, 323, Fed. Cas. No. 3,383. See, also, Allen v. Pike *supra;* Talbot v. Gay, 18 Pick. 534; Craft v. Isham, 13 Conn. 28. But New York and some other States hold to the contrary. See cases already cited. But here, again, the conflict seems to be founded primarily on the construction of the contract, and on the divergent views as to what constitutes an absolute guaranty. Conceding for the purposes of the case that no notice of acceptance of an absolute guaranty is required, and holding, as we do, that a mere offer or proposal of guaranty requires notice of acceptance by the other party, we are to determine to which class the instrument in suit belongs. The best statement of the rule we have been able to find is that announced in Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. Rep. 173, 29 L. Ed. 480, where Gray, J., speaking for the court, says: "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and

the delivery of the guaranty to him, or for his use, completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract." See, also, De Cremer v. Anderson (Mich.), 71 N. W. Rep. 1090. The case at bar clearly belongs to the latter class stated by Justice Gray. There is no evidence of any request from plaintiff to defendant guarantors, or of any consideration moving from it, and received or acknowledged by them at the time they signed the guaranty, or that credit was extended the Drake Roofing Company at the time the letter of guaranty was delivered. Indeed, it clearly appears that the guaranty was not signed at the request of plaintiff. It was not present, either by agent or otherwise, at the time the instrument was executed; and there was no consideration for the guaranty, except in the future advances to be made to the roofing company. Plaintiff did not know who was to sign the guaranty until it was delivered, and even after delivery it was not bound to extend credit to the roofing company. We are of opinion that the instrument was, in legal effect, a mere offer of guaranty, requiring notice of acceptance to bind the guarantors. It is conceded by all parties that the guaranty is a collateral, and not an original, promise. Hence we have no occasion to determine any other question than that already decided. If the letter should be construed to be an original promise on the part of the defendants to pay for any goods that might be furnished to the Drake Roofing Company, or to pay any advances that might be made to it, perhaps the delivery of the goods or the furnishing of the money might complete the contract, under the rule announced in Bish. Cont. §§ 330-333. But no such contention is made in the case. The waiver of notice found in the guaranty has no reference to the notice of acceptance.

Appellee contends, however, that we have already committed ourselves to the New York rule, and cites a number of our former decisions in support of its contention. This claim calls for a review of some of our previous cases. In Carman v. Elledge, 40 Iowa, 409, one Hampton had purchased a cow at public sale. Carman, the seller, refused to deliver her on Hampton's credit alone, and a note for the purchase price was drawn up and signed by Hampton. Defendant Elledge made an order on Carman to let Hampton have the cow, stating in the order that he would sign the note with Hampton. Relying on defendant's promise, Carman delivered the cow, but Elledge refused to sign or pay the note. In that case we approved the rule hitherto announced in this opinion, but held that the instrument, if a guaranty at all, was absolute and complete, and not a mere offer or proposal. It will be noticed that the obligation of the principal debtor in that case was complete at the time the order was written, and that the acceptance of the order and the delivery of the animal were contemporaneous. That case is an authority for the rule we have just announced. In Case v. Howard, 41 Iowa, 479, plaintiff sold one Hills a bill of goods on the faith and credit of a writing signed by defendant, as follows: "Mr. Hills wishing to purchase one case of tobacco on credit, I hereby agree to see the same paid for in four months, should said purchase be made." Recognizing the rule in the Carman case, we said, speaking through Day, J., "The guaranty in this case was absolute." This is all that is said regarding that point. That it was not regarded as controlling clearly appears from what follows. The opinion then recites that, when Hills returned from making his purchase, he exhibited a bill showing the purchase of the tobacco on credit of four months, and a settlement of the same by note. This was held to be notice to the defendant that the condition on which he had agreed to become liable had been performed. This case is in line with all the authorities which hold that the notice need not be in any particular form, nor need it come from the guarantee himself. Knowledge, no matter how acquired, is held to be notice, and it may be inferred from facts and circumstances warranting such a conclusion. See Adams v. Jones, *supra;* Bascom v. Smith, 164 Mass. 61, 41 N. E. Rep. 130; Bishop v. Eaton, 161 Mass. 496, 37 N. E. Rep. 665, 42 Am. St. Rep. 437; Oaks v. Weller, 16 Vt. 63; Bank v. Carpenter, 41 Iowa, 518. These cases are the only ones on which appellee relies, and we have seen that they do not support the rule contended for by it. There are some other cases to which it is well to call attention. In Case v. Luse, 28 Iowa, 527, the rule of Lee v. Dick, 10 Pet. 482, 9 L. Ed. 503, and the statement of the principle in 2 Pars. Cont. p. 13, note "d," was approved; and although the instrument sued on in that case was held not to be a promise, yet it was said that, if it had been, defendant was not bound, because not notified of its acceptance. In Farwell v. Sully, 38 Iowa, 387, the necessity of notice of acceptance of a guaranty and of future advances was recognized. In Crittenden v. Steele, 3 G. Greene, 538, the promise was held original, and not collateral, and it was said that no notice of acceptance was required. But the case really turned on defects in the pleadings. In Bank v. Carpenter, 41 Iowa, 523,—a case decided the next day after the Howard opinion was filed,—we said: "On this subject of notice of acceptance of a guaranty there is considerable conflict in the authorities, and upon this particular point especially, which, however, we will not undertake to reconcile or determine between the conflicting cases, since it follows that if the course of dealing between the parties immediately following the making of the guaranty, together with all the connecting circumstances, is sufficient to justify a finding that defendants had notice that plaintiff

was relying on the guaranty in making the advances," etc. This statement is quite conclusive of the proposition that the court had the day before held in the Howard case,—that no notice was necessary. In Scribner v. Rutherford, 65 Iowa, 551, 22 N. W. Rep. 670, it is held in effect, that a mere offer of guaranty must be accepted, and notice thereof given the guarantor. We are therefore committed to the rule that a mere offer or proposal of guaranty is not a complete contract until notice of acceptance thereof is given the guarantor. That is the rule we have now reaffirmed, and, applying the rule by which to determine whether or not the promise in this case was absolute, we find that it was a mere offer or proposal, and that, as defendants had no notice or knowledge of its acceptance, it was binding on them.

2. When a guaranty is continuing, and is unlimited in amount, and the amount for which the guarantor may be held responsible is subject to change, notice of advancements made and of the amount due when all the transactions are closed is generally held to be necessary. Machine Co. v. Mills, 55 Iowa, 543, 8 N. W. Rep. 356; Manufacturing Co. v. Littler, 56 Iowa, 601, 9 N. W. Rep. 905. In the instant case the amount of defendants' liability is fixed by the instrument itself, and the promise is such that notice of advancements made from time to time may well be said to have been waived. But, aside from this, the evidence shows that the Drake Roofing Company was insolvent from the time of the making of the guaranty down to the commencement of this suit. That fact alone is sufficient excuse for not giving notice of the advancements, or of the state of the account at the time the guaranty expired by limitation of time. Manufacturing Co. v. Welch, 10 How. 473, 13 L. Ed. 497. Demand and notice of non-payment were not essential to recovery. Claflin v. Reese, 54 Iowa, 544, 6 N. W. Rep. 729; Rodubough v. Pitkin, 46 Iowa, 544; Bank v. Gaylord, 34 Iowa, 246. For the error pointed out, the judgment of the district court is reversed.

NOTE.—*Recent Decisions on the Subject of Necessity and Character of Notice of Acceptance of Guaranty.*—One who seeks to enforce a guaranty must show that notice of its acceptance was given to the guarantor. Buckingham v. Murray's Ex'r (Del. Super.), 7 Houst. 176, 30 Atl. Rep. 779. A written offer to guaranty the payment of another's debt is not binding unless accepted by the one to whom it is made. Carter v. Wilkins (Tex. Civ. App.), 29 S. W. Rep. 1102. A written offer to "become surety" in a certain amount for a third person must be accepted to become operative as a guaranty. Lachman v. Block, 47 La. Ann. 505, 17 South. Rep. 173. One who, in response to a telegram from the seller as to whether he will guaranty the payment of the price of goods sought to be purchased by another, answers that he will, is not liable for such price unless notified of the acceptance of his guaranty. Evans v. McCormick, 167 Pa. St. 247, 31 Atl. Rep. 563. One who offers to guaranty the debt of a third person, to be contracted in the future, is not bound thereby unless the offer is accepted, and notice of such acceptance is given him within a reasonable time, in the absence of excuse for failure to give such notice. Farmers' Bank v. Tatnall (Del. Super.), 7 Houst. 287, 31 Atl. Rep. 879. No special notice of the acceptance of defendant's guaranty is necessary when defendant knew that plaintiff was performing work relying on it. Bascom v. Smith (Mass.), 41 N. E. Rep. 130. Where a written guaranty is delivered, not as an offer but as an acceptance of a proposition, no further notice to the guarantor of acceptance by the grantee is necessary. Lehigh Coal & Iron Co. v. Scallen (Minn.), 63 N. W. Rep. 245. On receiving a letter from defendant offering to guaranty payment of purchase by N, plaintiff sold N goods, and on the same day wrote defendant acknowledging the receipt of his letter, "guarantying whatever N may purchase of us," and saying that "his purchases up to this time amount to" a certain sum "which we are getting ready for shipment." Held, that the letter constituted a valid notice of acceptance. Hart v. Minchen (U. S. C. C.), 69 Fed. Rep. 520. A guaranty absolute in form does not require notice of acceptance to bind the guarantor. Niles Tool-Works Co. v. Reynolds, 38 N. Y. S. 1028, 4 App. Div. 24. Where, in answer to a letter asking defendants if they would guaranty a bill of goods sold to a third party, the defendants promised payment of all bills sold to such third party for a specific time, notice of an acceptance of the guaranty is unnecessary. Neagle v. Sprague, 63 Ill. App. 25. Where a proposition is made by one party to guaranty the payment to another, if he will sell goods to a third party, notice of acceptance of the proposition is necessary to create the contract of guaranty. Neagle v. Sprague, 63 Ill. App. 25. Where a guaranty of a third person is not accepted by the seller until he investigates as to the guarantor's responsibility, he is not liable thereon, without notice of acceptance. De Cremer v. Anderson (Mich.), 71 N. W. Rep. 1090. A guarantor, as a condition precedent to his liability, is not entitled to notice of the acceptance of the following guaranty: "The undersigned does hereby guaranty the faithful and full performance of the party of the second part to the contract of all the agreements and engagements therein entered into by the party of the second part." Lininger & Metcalf Co. v. Wheat, 49 Neb. 567, 68 N. W. Rep. 941. A letter from defendant to plaintiff, stating, "When S is ready to cut ties, if you can agree as to price, no doubt I can arrange the payment," was ineffective as a guaranty to pay for ties thereafter sold to S, plaintiff having given no notice that she had accepted or acted thereon, till several months after the sale. Gregory v. Bullock, 120 N. Car. 260, 26 S. E. Rep. 820. Where one directly binds himself to be responsible for another's contract, already made, and of which he has knowledge when he signs the contract of guaranty, no notice to him of acceptance of the guaranty is necessary. Shropshire v. Smith (Tex. Civ. App.), 37 S. W. Rep. 174. October 3d a third person wrote to a creditor that he would see that the debtor made a remittance in October, and that the account was paid by January 1. Replying, October 11th, the creditor asked that the guarantor would remit a part of the account by October 20th. On December 6th the creditor wrote: "As January 1st is nearly here, we beg leave to call your attention to your promise that you would see the account of S paid by that time." Held an acceptance. Armstrong, Cator & Co. v. Snyder (Tex. Civ. App.), 39 S. W. Rep. 379. A promise of guaranty is binding when the promise acts upon it, and it is not necessary that he should notify the promisor of his acceptance. Hart

v. Wynne (Tex. Civ. App.), 40 S. W. Rep. 848. Signing a guaranty without the guarantee's request, and in his absence, merely in consideration of future advances to the principal, or a recited nominal consideration in addition, requires acceptance and notice thereof to bind the guarantor. Barnes Cycle Co. v. Reed (U. S. C. C.), 84 Fed. Rep. 603. An offer of a continuing guaranty, executed by the guarantor at the special request of the agent of the person to whom the guaranty is addressed, and agrees to make advances thereon to the person for whose benefit the guaranty is executed, requires no further notice of acceptance to bind the guarantor. Ferst v. Blackwell (Fla.), 22 South. Rep. 892. Where a salesman, in notifying his house of a sale, states that, if necessary, the bill may be charged to him, the house cannot, four months later, on failure of the purchaser to pay, charge the same to the salesman, there having been no acceptance of such guaranty. Meyer v. Ruhstadt, 66 Ill. App. 346. Where a guarantor received a consideration for his guaranty, and this is known to the guarantee, and the words of the guaranty are certain, notice of acceptance is unnecessary. Sears v. Swift & Co., 66 Ill. App. 496. Under a guaranty of the payment of any bill that O may purchase "within ninety days from date of purchase, to the extent of two hundred dollars," stating that "this guaranty is intended to cover a running account, and is to be binding upon us until we notify you to the contrary in writing," notice of the acceptance of the guaranty, or that goods have been sold on the faith of it, is necessary to charge the guarantors; but formal notice in writing is not necessary, it being sufficient that the guarantors have knowledge within a reasonable time that goods have been sold on the faith of the guaranty. Ford v. Harris (Ky.), 43 S. W. Rep. 199. Where a contract of guaranty is given to obtain an extension of time on a debt due and further credit, and the creditor grants the extension and the credit as provided for, no further notice of the acceptance of the guaranty by the creditor is necessary. Marx v. Luling Co-op. Assn. (Tex. Civ. App.), 43 S. W. Rep. 596. A writer of a letter of guaranty has sufficient notice of acceptance where he is informed with a reasonable time that the guarantee had acted upon it. Friedman v. Peters (Tex. Civ. App.), 44 S. W. Rep. 572. In case of an absolute guaranty, no notice of acceptance by the guarantee is necessary. Wheeler v. Rohrer (Ind. App.), 52 N. E. Rep. 780. An absolute undertaking to be responsible for any unsettled balance due by another for goods furnished under a written contract not paid when required by its terms requires no notice of acceptance to bind the guarantor. Globe Printing Co. v. Bickley, 73 Mo. App. 499. The party to whom a guaranty of payment for goods to be sold in the future, is addressed is not required to notify the guarantor of the acceptance of such guaranty in advance of extending the proposed credit thereon. Standard Oil Co. v. Hoese (Neb.), 78 N. W. Rep. 292. In answer to a letter that plaintiff intended to remit a sum of money to a corporation of which defendant was president, for investment, defendant wrote plaintiff that if the remittance was made he would guaranty him against loss for a given period, and the details would be stated more definitely when the money was sent. Held a mere proposal of a guaranty to be thereafter made, and not a completed contract. Lamb v. Carley, 54 N. Y. S. 804, 35 App. Div. 503.

JETSAM AND FLOTSAM.

Threatening Circulars.

Attempts to destroy or cripple the business of a rival by threatening his customers with suits for infringement are not infrequent. Threatening circulars are sometimes sent out by a manufacturer whose claims of infringement are so baseless and dishonest that he cannot be induced to bring any suits to establish them, but who persists, nevertheless, in making threats to frighten customers away from his competitor. There has been much doubt as to a remedy for this wrong. For threats of infringement suits made in good faith, even if there is no infringement, there is clearly no remedy, but, when the threats are made in bad faith, and with the malicious purpose of wrongfully injuring a rival in business, there must be some remedy, unless the spirit of justice has departed from our jurisprudence.

The right to an injunction in such case has been upheld in some cases and denied in others, as appears from the note in 16 L. R. A. 243. In the Missouri case of Flint v. Hutchinson Smoke Burner Company, with which that note appears, the court refused to grant an injunction until the alleged slander of title of the patent had been determined in an action at law. In Kidd v. Horry, 28 Fed. Rep. 773, Mr. Justice Bradley also denied that an injunction could be granted against threats of infringement, even if they were malicious. On the other hand, such an injunction was granted by Judge Blodgett in Emack v. Kane, 34 Fed. Rep. 46, and also by a State judge in Croft v. Richardson, 59 How. Pr. 356. Other cases, without granting any injunctions against threatening circulars, have intimated that it might be done if the threats were false and malicious. Such are the cases of Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co., 13 Blatchf. 375; Kelley v. Ypsilanti Dress Stay Mfg. Co., 44 Fed. Rep. 19, 10 L. R. A. 686; Hovey v. Rubber Tip Pencil Co., 57 N. Y. 119; and Chase v. Tuttle, 27 Fed. Rep. 110. The authority on this side is greatly strengthened by the very recent case of A. B. Farquhar Co. v. National Harrow Co., 102 Fed. Rep. 714, in which the United States circuit court of appeals for the third circuit has upheld the right to an injunction against malicious circulars when they are used for the sole purpose of destroying the business of a rival.

The right to an action at law to recover damages for falsely and maliciously charging infringement of a patent, copyright, or trade mark is fully sustained by several decisions, among which are Snow v. Judson, 38 Barb. 210; McElwee v. Blackwell, 94 N. Car. 261; Andress v. Deschler, 45 N. J. L. 167; Dicks v. Brooks, L. R. 15 Ch. Div. 22; and Barley v. Walford, 9 Q. B. 197. There may be difficulties in the way of proving such a case, but the right of action when it can be proved is clear.—*Case and Comment.*

Effect of Nolle Prosequi in Malicious Prosecution.

A recent decision has reopened a controversy of long standing which had apparently been closed by a line of modern cases. The plaintiff was arrested on a warrant but the examining magistrate, without hearing any evidence, discharged the accused and dismissed the complaint. The court held this act equivalent to a *nolle prosequi*, and therefore not a sufficient termination of the proceeding to maintain an action for malicious prosecution. Ward v. Reasor, (Va.), 36 S. E. Rep. 470. While this view has some

backing, both reason and the trend of authority reject it. Murphy v. Moore (Pa.), 11 Atl. Rep. 665.

In early times, the only remedy available for one who had been maliciously accused was conspiracy, and to maintain this he must show a complete acquittal. But later, when an action for malicious prosecution was allowed, all that was necessary was a termination of the proceedings favorable to the accused. 2 Vin. Abr. 28. This distinction was not well understood by the courts and as, at that time, there was a mistrust of a *nolle prosequi* owing to its abuse by the public prosecutor, no little uncertainty as to its effect was caused. Goddard v. Smith, 6 Mod. 261.

The modern courts are misled both by these old English cases and by a misunderstanding of the allegations. It is not necessary that there should be an end to all prosecution upon that charge, but that the particular prosecution complained of shall have been finished. Unless this were so, no action could be founded upon an *ignoramus* by the grand jury, nor upon a discharge in a preliminary hearing, for, in both these cases, new proceedings may be begun. Thus there would be no remedy in those cases where the charge was least justified. A *nolle prosequi*, when put into force by a discharge, ends the particular prosecution, and in order to proceed against the accused again a new prosecution must be instituted. Woodworth v. Mills, 61 Wis. 44. The courts have also failed to distinguish carefully the allegations of lack of probable cause and termination of the prosecution. The reason for this latter allegation is merely to obviate the possibility of two proceedings upon the same dispute pending at the same time. Bishop, Non Contract Law, § 246. After termination of the proceedings has been shown, the task of proving a lack of probable cause still remains, and while this may be rendered more difficult by the manner of ending the prosecution, yet so long as there has not been a verdict of guilty, the fact that it has ended cannot be affected by the mode of closing it. When this distinction is kept in mind, there would seem to be no reason for insisting, as does the court in the principal case, that one cannot allege an end of the prosecution until some other court has passed on the question of probable cause. Kennedy v. Holladay, 25 Mo. App. 503.—*Harvard Law Review.*

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 73.

What is preferred stock and what are the special rights of its holders, is an important subject which finds interesting treatment in a note to the case of Heller v. National Marine Bank (Md.). The case of Frankel v. Frankel (Mass.), has an exhaustive note on the subject of suit, between husband and wife, where they may be maintained. Gifts to a class, such as "children," and who are entitled to take, is the subject of the note following the case of Thomas v. Thomas, (Mo.).

HUMORS OF THE LAW.

Henry W. Paine, one of the most brilliant lawyers of the Massachusetts Bar, not long before his death, became interested in a case as a matter of charity, in which a lad of some 15 years was charged with arson. Paine defended the boy and offered conclusive evidence that he was, to all practical purposes, an idiot and totally irresponsible. Nevertheless, the jury in the case, after a charge from the court, which was virtually an order for acquittal, brought in a verdict of guilty. The presiding judge then addressed Paine:

"You will move for a new trial, I presume, Mr. Paine."

Paine arose with a demeanor that was painful in its solemnity.

"I thank your honor for your suggestion," he said, "but I am impressed with the gravest doubts whether I have the right to move for a new trial in this case. Your Honor, I have already asked for and have received for my idiot client the most precious heritage of our English and American Common Law—a trial by a jury of his peers."

The Judge then ordered the verdict set aside.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNTING—Partnership.—A bill in equity for an accounting between partners which did not allege the existence of a past or present partnership between complainant and defendants, nor that complainant was a member of such partnership, or that it had been dissolved, and which contained no prayer for dissolution, was insufficient.—TUTWILER V. DUGGER, Ala., 28 South. Rep. 677.

2. ADVERSE POSSESSION—Landlord and Tenant.—A tenant who has openly disavowed the landlord's title, and notoriously held adversely to him, with his knowledge, will be protected by the statute of limitations after the lapse of 15 years.—SOUTH'S HEIRS V. MARCUM, Ky., 58 S. W. Rep. 527.

3. ASSIGNEE FOR BENEFIT OF CREDITORS—Additional Compensation.—Where an assignor for benefit of creditors executed to his assignee an instrument which recited that as, with proper administration, there would probably be a surplus over the claims of creditors, and, if there were, the assignee should have a certain percentage on the same in addition to his legal fees, it was error, in an action on the agreement, to submit to the jury the question whether the agreement was in-

tended to add to plaintiff's legal compensation, or to stipulate for payment of services beyond his legal duties, since, there being no ambiguity in the instrument, its legal meaning was a question for the court.—CARPENTER v. TAYLOR, N. Y., 58 N. E. Rep. 53.

4. BANKRUPTCY — Commissions of Referee.—The setting aside of a homestead exemption to a bankrupt from the proceeds of property sold by the trustee is not the making of a dividend, such as the referee is entitled to a commission for.—IN RE GARDNER, U. S. D. C., E. D. (Va.), 103 Fed. Rep. 922.

5. BANKRUPTCY—Preferred Claims Against Estate.—Claims of an assignee for the benefit of creditors for his compensation and expenditures in administering the estate prior to the filing of a petition in bankruptcy against the assignor are not preferred claims entitled to priority of payment out of the money in the hands of the trustee in bankruptcy, under Bankr. Act, § 64b, which limits such claims to "the actual and necessary cost of preserving the estate subsequent to filing the petition;" nor, in the absence of such express limitation, could the claim be allowed where the assignment was made after the enactment of the bankruptcy law, such assignment being not only an act of bankruptcy thereunder, but in contravention of the policy of the law, which is to draw to the bankruptcy courts the administration of the estates of all insolvents.—STEARNS v. FLICK, U. S. D. C., S. D. (Ohio), 103 Fed. Rep. 919.

6. BENEFIT SOCIETIES—Death of Beneficiary Named.—Where a member of a benefit society took out a benefit certificate payable to his wife, naming her, and after her death he married again, and died childless, leaving his second wife surviving him, but without having named another beneficiary, the widow is entitled to the benefit fund (under a provision of the charter securing the fund to the "family" of the deceased member), to the exclusion of the father of deceased, who was not a member of his family, or dependent upon him for support, and also to the exclusion of the administrator; it being provided by the charter that in no event shall the fund be liable for any debt of the member.—O'NEAL v. O'NEAL, Ky., 58 S. W. Rep. 529.

7. BILLS AND NOTES — Conditions—Enforcement.—A note reciting a promise to pay "on or before four years from date" gives to the maker the privilege of paying at any time before the end of the four years, but does not give the holder a right to enforce collection before that time.—PAGAL v. NICKEL, Wis., 83 N. W. Rep. 767.

8. BILLS AND NOTES — Consideration — Fraudulent Conveyances.—That defendant executed the note in suit in payment for land conveyed to him by the payee in fraud of the latter's creditors is no defense to an action thereon by the payee's administrator, since such action does not involve an enforcement of the fraudulent conveyance.—HARCROW v. HARCROW, Ark., 58 S. W. Rep. 553.

9. BILLS AND NOTES—Usury — Bona Fide Holders.—Where, in an action on a note defendant's plea set up both failure of consideration and that the holder was not a *bona fide* purchaser, in that he had discounted the note at a usurious rate of interest, the plaintiff was entitled to judgment, where the first defense was made out, but the second was not.—KING v. PEOPLE'S BANK OF MOBILE, Ala., 28 South. Rep. 658.

10. BILLS OF EXCEPTIONS — Filing Out of Time.—Where time to file a bill of exceptions was given until the second day of the August special term, which began on the first Monday in August, a bill of exceptions tendered and filed August 15th cannot be considered.—KENTUCKY LAND & IMMIGRATION CO. v. REYNOLDS, Ky., 58 S. W. Rep. 583.

11. CARRIERS — Contract of Insurance—Authority of Agent.—A person contracting with a carrier, through its agent, for the transportation of goods, is not chargeable with notice of limitation of the agent's right to contract, when he is a general agent of the company in charge of its business at the place where the contract is made, and the contract is the kind usually made by such agents.—LOWENSTEIN v. LOMBARD, AYRES & CO., N. Y., 58 N. E. Rep. 44.

12. CARRIERS—Injuries to Trespasser.—A person, not an employee, riding on a work train in violation of a rule forbidding the carrying of passengers on work trains, is presumed to be a trespasser, and this presumption is not overcome by proof of any number of former trespassers having ridden thereon.—INTERNATIONAL, ETC. RY. CO. v. HANNA, Tex., 58 S. W. Rep. 548.

13. CARRIERS — Passenger — Damages.—Where the plaintiff, a woman, was wrongfully ejected from defendant's train, in which she was a passenger, while her trunk was carried to her destination, several thousand miles distant, leaving her without a change of clothing, by reason of which she was compelled to buy, she is entitled to have the inconvenience and discomfort caused her taken into consideration in estimating her damages, as well as her pecuniary loss, but the cost of the clothing purchased is not a proper element of damages.—PROCTER v. SOUTHERN CALIFORNIA RY. CO., Cal., 62 Pac. Rep. 806.

14. CARRIERS OF PASSENGERS — Trespassers.—Where the conductor of a train, on discovering the presence of a trespasser on the train, gave him permission to ride to D if he would throw the switch at that place, the boy, upon returning to the train without permission of the conductor after throwing the switch, again became a trespasser; and the company owed him no duty, except to exercise reasonable care for his protection after his peril was discovered.—CINCINNATI, ETC. R. CO. v. JACKSON, Ky., 58 S. W. Rep. 526.

15. CONTRACTS—Agreement for Fraudulent Entry of Public Lands.—A contract by which one person agrees to acquire title to a tract of public land through the homestead laws, and to convey the same to another, cannot be enforced by the promisee after the entry has been consummated, being one for the commission of a fraud upon the United States, in violation of Rev. St. U. S. § 2290, which require one making a homestead entry to make affidavit that it is for his exclusive use and benefit, and not, either directly or indirectly, for the use or benefit of another.—MOORE v. MOORE, Cal., 62 Pac. Rep. 204.

16. CONTRACT—Illegal Contract.—When an illegal contract has been executed, and the parties thereto are *in pari delicto*, no action lies to recover money paid under it, or for restitution of property delivered in pursuance of its terms. This rule applies to the parties themselves, and to all others claiming through or under them.—BROWER v. FASS, Neb., 83 N. W. Rep. 832.

17. CONTRACT AS TO PATENT RIGHTS—Jurisdiction.—Where a suit is brought to enforce a contract of which a patent is the subject-matter the case arises on the contract, and not under the patent right laws of the United States.—CARLETON v. BIRD, Me., 47 Atl. Rep. 154.

18. CORPORATIONS — Dissolution—Necessary Parties.—A decree dissolving a corporation on the joint bill of a simple contract creditor and a minority of the stockholders, without the stockholders at large being made parties, is void, though the president consented to the obtaining of such decree.—MCKLEROY v. GADSDEN LAND & IMPROV. CO., Ala., 28 South. Rep. 660.

19. CORPORATIONS — Suspension of Business.—The cessation by a corporation of all the business for which it was organized, and the transaction of only such as is incidental and necessary to the final closing up of its affairs, is a suspension of business, within the meaning of the statute (Gen. St. 1899, ch. 23, § 66); and under such statute, for the purpose of suits by creditors against stockholders, such suspension, if continued for one year, is to be deemed a dissolution of the corporation.—BRIGHAM v. NATHAN, Kan., 62 Pac. Rep. 319.

20. CRIMINAL LAW — Embezzlement as Bailee.—A defendant cannot be convicted of the embezzlement of money as bailee under Pen. Code, § 507, upon evidence which shows without contradiction that he received the money from the complaining witness to be invested for her in stocks, and that he so invested it, and that if he was guilty of any offense it was the conversion of the stocks; the relation between the parties as to the money being one of agency, and not of bailment.—PEOPLE V. LEIPSIC, Cal., 62 Pac. Rep. 811.

21. CRIMINAL TRIAL—Exclusion of Witnesses.—Refusal to permit a witness to testify on a trial for bastardy, on the ground that he had violated an order excluding witnesses, was reversible error, where neither the State nor the relatrix was responsible for the violation of the order, and did not know he was present.—STATE V. DAVID, Ind., 58 N. E. Rep. 83.

22. DEEDS—Railroad Purposes—Conditions.—A conveyance of land for railroad purposes only, to revert to the grantor if not so used, is not breached by the operation only of gravel trains from time to time, though at no stated times.—BEHLOW V. SOUTHERN PAC. R. CO., Cal., 62 Pac. Rep. 295.

23. EASEMENTS—Estoppel.—A prior grantor of defendant laid out an addition to an unincorporated village, and defendant sold plaintiff two lots in such addition, describing them according to lots and blocks as platted in the addition. The street in front of plaintiff's lots was declared a highway by the town board, but was never formally opened or improved by the village authorities, and after plaintiff's purchase defendant fenced up the street. Held, that plaintiff was entitled to have such fences removed and their maintenance restrained, as, by his purchase with reference to the street, he obtained an easement to use it in connection with his lots, of which his grantor is estopped to deprive him, whether the public have an easement therein or not.—MCFARLAND V. LINDEKUGEL, Wis., 83 N. W. Rep. 757.

24. ELECTIONS—Nominations—Conclusiveness.—The action of the governing authorities of a political party in declaring a certain person to be the nominee of the party for congress is conclusive, and will not be reviewed by the courts.—MOODY V. TRIMBLE, Ky., 58 S. W. Rep. 504.

25. ELECTION — Voters — Residence—Student.—Under Const. art. 2, § 3, which provides that no person can gain or lose his residence as a voter by his presence or absence as a student at a seminary, evidence that a student had entered a seminary for the purpose of becoming a priest, and that no person is allowed to enter or remain in a seminary as a student unless he renounces all other residences or homes, and that on his admission to the priesthood he continues in the seminary until assigned elsewhere, is not sufficient to change his legal residence, as the change of residence of a student must be proved by acts independent of his *status* as a student. — IN RE BARRY, N. Y., 58 N. E. Rep. 12.

26. EMINENT DOMAIN — Railroads — Failure to Make Compensation.—Where a railroad company enters on land and constructs and operates its road without the owner's consent, and without first having made just compensation, as required by the constitution, the owner may oust the company by ejectment, if it does not then make compensation, though he had knowledge of the construction of the road and permitted the company to expend large sums of money; and hence a bill to restrain such ejectment, which does not offer to make compensation, must be dismissed.—SOUTHERN RY. CO. V. HOOD, Ala., 28 South. Rep. 662.

27. EQUITY — Pleading — Multifariousness. — A bill averred the registration of a judgment and a lien on certain stock, and an execution sale at which complainant became the purchaser, and that a third person claimed the stock by a transfer which was ineffectual, because made during the lien's existence, and sought to establish ownership of the stock. Held no multifarious, because of the joinder as defendants of the third person claiming the stock and the corporation, as the relief granted would affect both defendants.—HOWARD V. COREY, Ala., 28 South. Rep. 652.

28. ESTOPPEL — Sale of Land — Representations of Title.—Where, in an action for possession of real estate, plaintiff's reply set up that he had purchased the premises, of which defendant was tenant by curtesy, in reliance on a statement of defendant that he had no interest therein, the reply sufficiently set up an estoppel, though not charging fraud, or that defendant knew his rights.—BLOCH V. SAMMONS, Oreg., 62 Pac. Rep. 290.

29. EXCHANGES — Property Right in Market Quotations.—A board of trade has a property right in the quotations made upon the transactions of its exchange, as prepared by its officers and agents, until their publication.—BOARD OF TRADE OF CITY OF CHICAGO V. C. B. THOMSON COMMISSION CO., U. S. C. C., E. D. (Wis.), 103 Fed. Rep. 902.

30. EXECUTORS—Power Under Will.—Where an executor empowered by a will to mortgage his testator's property executes a mortgage, in his capacity as executor, containing warranties of title and a promise to pay taxes and attorney's fees, and gives his notes for the money secured thereby, he is personally bound therefor, as giving the notes and making the warranties are not necessary to the execution of the power.—DE COUDRES V. UNION TRUST CO., Ind., 58 N. E. Rep. 90.

31. FALSE IMPRISONMENT — Void Order of Arrest.—Where an affidavit filed by a plaintiff to secure an order for the arrest of the defendant in a civil action contains statements made expressly on information and belief, and fails entirely to "state the facts upon which the information and belief are founded," as imperatively required by Code Civ. Proc. § 481, it confers no jurisdiction upon the judge to grant the order, and an order issued thereon is void, and affords no protection to the plaintiff against a subsequent action by the defendant arrested thereon for false imprisonment.—FKUMOTO V. MARSH, Cal., 62 Pac. Rep. 303.

32. FEDERAL COURTS — Habeas Corpus. — Where a person has been regularly indicted for the violation of the criminal statutes of a State, and is in the custody of the State authorities, he will not be discharged before trial by a federal court, on *habeas corpus*, on the ground that he was forcibly and illegally brought within the jurisdiction, but he will be required to submit his rights under the federal laws for adjudication, in the first instance, to the courts of the State.—EX PARTE GLENN, U. S. C. C., D. (W. Va.), 103 Fed. Rep. 948.

33. FEDERAL COURTS—Injunction Staying Proceedings in State Court.—Rev. St. § 720, prohibiting a federal court from granting an injunction to stay proceedings in a State court, except in relation to bankruptcy matters, does not prevent the removal upon the usual grounds of a suit from a State court in which such an injunction has been granted; and in case of such removal, under section 4 of Act March 3, 1875, the injunction previously granted remains in force until dissolved or modified by the federal court.—EUREKA & K. R. R. CO. V. CALIFORNIA & N. RY. CO., U. S. C. C., N. D. (Cal.), 103 Fed. Rep. 897.

34. FIXTURES—Wagon Scales—Attachment to Lot.—Where the vendor sold wagon scales to the defendant on condition that title should not pass until the price was paid, but, before receiving his money, allowed them to be set up for use on defendant's lot, and the lot was sold at sheriff's sale on a judgment against defendant, the purchaser at such sale, who had no notice of the vendor's lien until after he had taken possession under the sheriff's deed, was entitled to the scales, as against the vendor. — THOMSON V. SMITH, Iowa, 88 N. W. Rep. 789.

35. FRAUDS, STATUTE OF — Memorandum of Agreement.—Under Rev. St. 1898, § 2304, providing that every

contract or memorandum of sale shall be in writing expressing the consideration, and be subscribed by the party by whom the sale is to be made, a memorandum reciting that one party agrees to sell the merchandise in a certain store building, located on specified lots, to another, and to transfer the insurance on such merchandise and buildings, in consideration of the purchase of the lots specified by the latter party, for a certain sum, is sufficient, since it was not necessary to resort to parol evidence to gather the intent of the one party to convey, and the other to purchase.—VAN DORSEN v. ROSPKE, Wis., 83 N. W. Rep. 754.

86. FRAUDS, STATUTE OF — Real Property. — Where there was no previous partnership or joint enterprise between the parties, and they agreed by parol that defendant should purchase and take title to land in his own name, and hold it for the joint benefit of both, and plaintiff contributed no money to the enterprise, the contract was within the statute of frauds, requiring agreements relating to land to be in writing, and plaintiff could not recover any interest in the land without written proof of the contract.—SCHULTZ v. WALDONS, N. J., 47 Atl. Rep. 187.

87. FRAUDULENT CONVEYANCES—Action to Set Aside. —Where the trust deed sought to be set aside as in fraud of creditors expressly recognized plaintiff's claim, and it appeared that the debtor was insolvent, it was not necessary for plaintiff to obtain judgment and a return of execution *nulla bona* before filing his bill in equity, since such proceedings would be of no avail.—SPRINGFIELD GROCERY CO. v. THOMAS, I. T., 58 S. W. Rep. 557.

88. FRAUDULENT CONVEYANCES—Limitation of Action. —Where the existence of a deed executed by a debtor to his wife with intent to defraud his creditors was not discovered by a creditor until seven years after its execution, an action to set aside the deed brought by him soon after such discovery was not barred by the five years statute of limitations, the deed not having been recorded in the proper county, and there being nothing to put anyone on notice that the title was claimed by the wife.—MCGEHEE v. COX, Ky., 58 S. W. Rep. 582.

89. FRAUDULENT CONVEYANCES—Preference to Wife. —Where a husband, while free from debt, gave certain property to his wife, and afterwards borrowed the proceeds, a conveyance to her in payment thereof, after he becomes insolvent, is not fraudulent, although it is a preference over other creditors.—KNOX v. CLARK, Colo., 62 Pac. Rep. 334.

40. GIFTS — Insurance Policy. — The delivery of an insurance policy by a mother to her daughter, after her declaration of an intention to give it to her as her own, with its acceptance and possession by the daughter, is sufficient to constitute a gift, without a written assignment.—HANI v. GERMANIA LIFE INS. CO., Penn., 47 Atl. Rep. 200.

41. GIFTS—Trusts.—Where one caused stock to be issued to him as trustee for another, but there was no delivery of the stock to the beneficiary, there was no gift.—CASTEEL v. FLINT, Iowa, 83 N. W. Rep. 796.

42. HUSBAND AND WIFE—Alienating Husband's Affections.—In an action by a wife for damages for alienating her husband's affections, the husband's statements to a third party respecting his wife after his abandonment of her are not admissible as *res gestæ*.—LYON v. LYON, Penn., 47 Atl. Rep. 193.

43. INDORSEMENT—Necessity.—Where the vendors sold to plaintiff cotton which they had stored in a warehouse, for which they delivered to him warehouse receipts, an indorsement of such receipts by the vendors was not necessary to transfer title to plaintiff.—WEIL v. PONDER, Ala., 28 South. Rep. 656.

44. INSURANCE — Arbitration Agreement.—Where an insurance policy provided for arbitration only on disagreement as to amount of loss, and also stipulated for the selection of an umpire before appraisement, a contract for arbitration made before disagreement as to loss, and providing for selection of an umpire only when necessary, not being under the terms of the policy, was revocable.—HARRISON v. HARTFORD FIRE INS. CO., Iowa, 83 N. W. Rep. 820.

45. INSURANCE—Policy—Surrender.—Where an insurance policy containing provision for cancellation by the insurance company, by giving five days' notice, was surrendered by the holder, and there was nothing showing an intention to surrender for immediate cancellation, such surrender did not avoid the liability of the company for a loss occurring within the five days. —WICKS v. SCOTTISH UNION & NAT. INS. CO., Wis., 83 N. W. Rep. 781.

46. JUDGMENT BY DEFAULT — Equitable Relief.— There is no statute or rule of practice requiring the trial court to have a defendant called at the door of the court house before entering judgment by default, and hence a bill to enjoin such judgment for such failure will not lie.—KANAPE v. REEVES, Ala., 28 South. Rep. 686.

47. LANDLORD AND TENANT — Trade Fixtures—Removal by Lessee.—Machinery which a lessee of mining premises places thereon for the operation of the mine, though firmly attached to the realty, is a trade fixture, which he is entitled to remove within a reasonable time after the forfeiture of the lease.—UPDEGRAFF v. LESEM, Colo., 62 Pac. Rep. 342.

48. LIEN—Logs and Logging.—Under Rev. St. § 3329, conferring a lien for labor under services in cutting or hauling logs, one who worked in building and keeping logging railroad in repair was not entitled to a lien on lumber manufactured from logs hauled on the road.— CARPENTER v. BAYFIELD WESTERN RY. CO., Wis., 83 N. W. Rep. 764.

49. LIFE INSURANCE — Application — Warranty.— Where deceased in his application for life insurance warranted as true statements as to material facts which were in fact untrue, the effect of such warranty is not qualified by another statement in such application that he had made no intentional omission, concealment, or mental reservation of any material fact or circumstance; such omission, concealment, or mental reservation having no application to false statements.—MCGOWAN v. SUPREME COURT OF INDEPENDENT ORDER OF FORESTERS OF TORONTO, CANADA, Wis., 83 N. W. Rep. 775.

50. LIMITATIONS—Demurrer.—A defense of limitation is not demurrable, but a defendant has the right to plead the statute, and to have the issue thereby raised passed upon by the court in the consideration of the case, as a matter of right.—SONOMA CO. v. HALL, Cal., 62 Pac. Rep. 812.

51. MARRIAGE — Action to Annul.—Where a husband sues to annul the marriage, and the wife asserts its validity in her answer, the supreme court has power, under Code Civ. Proc. §§ 1742-1755, vesting in such court general jurisdiction over actions to annul marriages, to grant her counsel fees and alimony *pendente lite*, since such general jurisdiction carries with it by implication the necessary incidental power to award counsel fees and alimony.—HIGGINS v. SHARP, N. Y., 58 N. E. Rep. 9.

52. MASTER AND SERVANT—Contributory Negligence. —One who with knowledge of the grossly negligent and reckless habit of another, voluntarily and unnecessarily places himself in the way of receiving injuries at his hands, is guilty of contributory negligence, and cannot excuse himself upon the ground that the conduct of the other was wanton and willful in character, unless such other had knowledge or apprehension that he was about to inflict injury, and made no effort to avert it.—BEAL v. ATCHISON, ETC. RY. CO., Kan., 62 Pac. Rep. 321.

53. MASTER AND SERVANT—Defective Appliance.— Where a servant was injured in rolling a hogshead of tobacco as the result of a defective skid, the fact that he had some knowledge of the defect does not preclude him from recovering if the master had superior

means of knowledge, or assured him that the skid was safe, unless the danger was so obvious that a prudent man would not incur the risk.—WAKE v. PRICE, Ky., 58 S. W. Rep. 519.

54. MECHANICS' LIENS—Completion of Building Contract.—Where an owner of property on which a house is built insists that certain details are not according to the contract, and they are changed by the contractor, a mechanic's lien is in time if filed within the statutory period after such changes are made.—STIDGER v. MCPHEE, Colo., 62 Pac. Rep. 332.

55. MORTGAGE—Set-Off—Judgments.—A judgment for damages for breach of a covenant of warranty in the conveyance of property will be allowed in reduction of the mortgage debt for such conveyance.—HARRINGTON v. BEAN, Me., 47 Atl. Rep. 147.

56. MORTGAGES — Validity as to Third Parties.—Where a husband conveyed two lots to his wife in good faith to secure a loan with which to purchase another lot, and both he and his wife executed a mortgage covering such lots and other lots owned by the wife, and the conveyance to the wife was afterwards held void as to a subsequent judgment creditor of the husband, who became absolute owner of the two lots, under such judgments, the fact that the husband's conveyance to the wife was set aside did not render the subsequent mortgage void as to the two lots so conveyed.—QUINNIPIAC BREW. CO. v. FITZGIBBONS, Conn., 47 Atl. Rep. 128.

57. MORTGAGES—Validity—Priority of Lien.—A mortgagee in a mortgage executed to secure a pre-existing debt is not a *bona fide* purchaser entitled to priority of lien over a prior unrecorded mortgage on the property.—SMITH v. MOORE, Iowa, 83 N. W. Rep. 813.

58. MUNICIPAL CORPORATION—Bond Issue—Renewal or Extension of Bonds.—An act of the general assembly to authorize a municipality to issue bonds for the construction of a public improvement having been adjudged by this court to be constitutionally valid, and the bonds having been thereafter sold and the improvement made, the court will follow the former decision as to the validity of supplementary acts relating to the renewal or extension of such bonds.—CITY OF CINCINNATI v. TAFT, Ohio, 58 N. E. Rep. 63.

59. MUNICIPAL CORPORATIONS—Failure to Contract for Use of Water Plugs.—Where a town, pursuant to authority conferred by its charter to contract with a water company for water for extinguishing fires "for such time and upon such terms" as might be agreed upon, contracted with a water company for the use of 15 water plugs for five years, with the privilege to continue the contract for 15 years if it should "elect to do so," the failure of the town to continue the contract at the end of the 5 years does not render it liable for losses by fire resulting from the failure to have the water plugs supplied with water.—SANDUSKY v. CITY OF CENTRAL CITY, Ky., 58 S. W. Rep. 516.

60. MUNICIPAL CORPORATIONS—Obstruction of Street—Nuisance.—A platform built along the side of a wholesale grocery, 70 feet in length, 2 feet high, and 5 feet wide, within the stoop limits, with steps at each end, and used in connection with the business, in loading and unloading wagons was not a nuisance *per se*.—MURPHY v. LEGGETT, N. Y., 58 N. E. Rep. 42.

61. MUNICIPAL CORPORATIONS—Powers of Board of Education.—The board of education of a city of the second class was not authorized, prior to the act of March 20, 1900, to petition the county court to submit to the voters of the city a proposition authorizing the issue and sale of bonds, and an election held under an order of the county court based upon such a petition was void.—BERKLEY v. BOARD OF EDUCATION OF CITY OF LEXINGTON, Ky., 58 S. W. Rep. 506.

62. NEGLIGENCE—Question for Jury.—The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence.—WAHLGREN v. MARKET ST. RY. CO., Cal., 62 Pac. Rep. 308.

63. NEGLIGENCE—Street Railways—Killing of Child—Negligence of Parents.—In an action by the administrator of a child for damages for its death from being run over by a car of the defendant company, the negligence of the child's parents in allowing it to play in the street is an immaterial question, where it does not appear that the parents are in a position to be benefited by a participation in the distribution of the amount recovered.—MURPHY v. DERBY ST. RY. CO., Conn., 47 Atl. Rep. 120.

64. NEGLIGENCE—Sufficiency of Evidence.—An instruction that the proximate cause of an injury is that from which the result follows as the natural and probable consequence,—probable from the standpoint of the person who is charged with the lack of ordinary care,—is erroneous, in making the degree of caution dependent on the person required to exercise care, instead of the exercise of ordinary care.—HUDSON v. NORTHERN PAC. RY. CO., Wis., 83 N. W. Rep. 769.

65. NEW TRIAL—Criminal Law.—Rev. St. § 5416, provides that application for a new trial shall be by motion, which shall be filed within three days after verdict is rendered, unless additional time be granted by the court. Held, that where defendant was convicted of manslaughter, and failed to file his motion for a new trial within three days after the rendition of the verdict, an assignment of error based on the court's refusal to grant a new trial would not be considered on appeal.—CASTEEL v. STATE, Wyo., 62 Pac. Rep. 848.

66. PARENT AND CHILD — Custody of Child.—A parent's right to the custody of an infant child is not absolute, and will not be enforced when seriously detrimental to the interests of the child, which are the paramount consideration.—HADLEY v. FORREST, Iowa, 83 N. W. Rep. 822.

67. PRINCIPAL AND AGENT — Discharge of Servant.—Where defendant's superintendent, having general control of its business, hired plaintiff as foreman of defendant's mill, defendant was bound thereby, since the contract was within the general scope of the superintendent's authority.—PECK v. DEXTER SULPHITE PULP & PAPER CO., N. Y., 58 N. E. Rep. 6.

68. PRINCIPAL AND SURETY — Note—Release.—Where a surety is induced to sign a note by representations of the principal that the proceeds are to be used to pay for grain purchased by him, which representations were known to the lender, the application of a part of the proceeds to an indebtedness of another character due the lender will release the surety from liability.—CROSSLEY v. STANLEY, Iowa, 83 N. W. Rep. 806.

69. PUBLIC LANDS—Suit to Determine Adverse Claim.—A complaint in a suit under Rev. St. § 2326, in aid of an adverse claim filed to public lands, which alleges that the land is valuable mineral ground, constituting a part of a claim taken by plaintiff under the mining laws, and which has ever since been, and is still, occupied and held by him thereunder, and that defendant is seeking to obtain title thereto as a mill site, states a cause of action under the statute, the purpose of which is to provide for a suit to determine the right of possession as between the adverse claimants in aid of the land department.—DURGAN v. REDDING, U. S. C. C., N. D. (Cal.), 103 Fed. Rep. 914.

70. RAILROAD COMPANY — Negligence — Proximate Cause.—Where a locomotive negligently run through a town at a high and dangerous rate of speed strikes a person at a crossing, and hurls his body a distance from the track, where it strikes and injures the plaintiff, the latter cannot recover from the company, as his injury was not the proximate result of the negligent running of its locomotive.—EVANSVILLE, ETC. R. CO. v. WELCH, Ind., 58 N. E. Rep. 88.

71. RAILROAD COMPANY — Street Railroads—Injury to Traveler.—It is the duty of a street railroad company

to keep its track from becoming an obstruction to public travel, and it cannot escape liability to a traveler for its failure to do so by showing that the obstruction was caused by the wearing away or natural sinking of the street from the rails.—GROVES v. LOUISVILLE RY. CO., Ky., 58 S. W. Rep. 508.

72. RELIGIOUS SOCIETIES — Ecclesiastical Law—Consolidation of Churches.—Where, according to the book of discipline of the Methodist Episcopal Church, as construed by its bishops and its ecclesiastical authorities, the bishop who presides at the annual conference has the power to consolidate two or more churches into one church, and the trustees of the church thereby become in the law of the church the successors of the trustees of the churches whose existences were terminated, and such construction is the common understanding and practice of the church, and has never been called in question, it is binding on the courts.—TRUSTEES OF TRINITY M. E. CHURCH OF NORWICH v. HARRIS, Conn., 47 Atl. Rep. 116.

73. REPLEVIN — Amendment of Answer.—In replevin the evidence showed that the plaintiff was represented by counsel in a former attachment suit in which he claimed the same property, and that the judgment in such suit was against the nominal plaintiffs, who, in reality, represented the present plaintiff. The trial court allowed the defendant to set up such facts in an additional paragraph in his answer after the close of the evidence. Held, that the action of the trial court in allowing such amendment was not an abuse of discretion, nor prejudicial to plaintiff, as the facts could be shown under the general denial.—CASE v. MOORMAN, Ind., 58 N. E. Rep. 85.

74. SALES—Delivery of Goods—Reasonable Time.—In an action on an executory contract for the sale of merchandise, where no time for delivery has been fixed by the parties, the burden of proof is on the seller to show a delivery, or an offer to deliver, within a reasonable time.—EPPENS, SMITH & WIEMANN CO. v. LITTLEJOHN, N. Y., 58 N. E. Rep. 21.

75. SALES—Guaranty—Statute of Frauds.—Defendant orally agreed to accept a draft to be given by a third person in payment of goods to be sold such person by plaintiff. Thereupon defendant sold the goods to such person without obtaining the draft, which the latter refused to give. Held, that plaintiff could not recover the value of the goods from the defendant, as he had only agreed to accept the draft, and not to pay for the goods.—PAKE v. WILSON, Ala., 28 South. Rep. 665.

76. TAXATION — Exemptions.—Ground and buildings owned by a commandery of the Knights Templar, used for the appropriate objects of the organization not to exceed four days each year, and at other times as a summer resort for members of such organizations and their families, but not leased or used for pecuniary benefit, are not devoted solely to the appropriate objects of the organization, and are not exempt from taxation, under Code, § 1304, exempting "all grounds and buildings used for charitable, benevolent and religious institutions and societies, devoted solely to the appropriate object of these institutions, and not leased or otherwise used with a view to pecuniary profit."—LACY v. DAVIS, Iowa, 83 N. W. Rep. 784.

77. TAXATION — State Banks—Deposits.—Where State bank stockholders deposited a sum equal to the face value of the stock held at the time of organization, and certificates of deposit were issued to such stockholders, among whom there was an oral agreement that the deposits should not be withdrawn, but, in case of a sale of stock, should pass to the purchasers, to whom new certificates of stock should issue which agreement was observed, and the stockholders' certificates were in terms payable on surrender, and bore an indorsement, "Non-negotiable," such deposits were properly assessed to the bank, under Code, § 1322, providing that shares of stock in State banks shall be taxed to such banks.—STATE EXCH. BANK OF PARKERSBURG v. TOWN OF PARKERSBURG, Iowa, 83 N. W. Rep. 793.

78. TENANTS IN COMMON—Partnership—Rights and Liabilities.—One tenant in common, without authority from his co tenant, cannot create a personal liability against him by making improvements on the common property, or payments in regard to it, as to which the co-tenant was not under a legal liability. When the improvements and permanent value to the property, the tenant making them, if in receipt of the rents, may be permitted to hold them for his reimbursement, but his right to contribution extends no further.—WINSLOW v. YOUNG, Me., 47 Atl. Rep. 149.

79. TENANTS IN COMMON — Waste — Rights of Co-Tenants.—Where a tenant in common of a mountainous tract of land, the chief value of which was in its deposits of trap rock, quarried large quantities of such rock, which he sold without the consent of his co-tenants, and without accounting for any part of the profits, the co-tenants were entitled to maintain an action for an accounting for rents and profits, under Code, § 1656, since the quarrying and sale of such rock constituted waste.—COSGRIFF v. DEWEY, N. Y., 58 N. E. Rep. 1.

80. TRESPASS—Entering Dwelling House — Action.—Plaintiff, being the head of the family and in possession of the household during the absence of her husband, could maintain an action against defendant for unlawfully entering the house, though the ownership thereof was in the husband.—FORD v. SCHLIESSMAN, Wis., 83 N. W. Rep. 761.

81. TRESPASS — Joint Liability — Flowage.—Where various property holders who ran water from their premises into an underground pipe, which ran into an open sewer along plaintiff's wall, flooding his premises, acted entirely independent of each other, none of them believing that any injury would result therefrom to plaintiff's property, they were not joint trespassers, and no one of them is liable for the acts of the others.—BONTE v. POSTEL, Ky., 58 S. W. Rep. 536.

82. WATERS AND WATER COURSES—Drains—Establishment.—Where a complaint averred that a ditch one to three feet deep and three to five feet wide, running across and draining plaintiff's lots, and thence across defendant's land, was dug 50 years ago by plaintiff's grantor, and had continued openly and adversely for such period, and had been used by plaintiff individually for 30 years, and that defendant had obstructed such ditch on his premises, causing the drainage to overflow plaintiff's premises, to his damage, it stated facts sufficient to constitute a cause of action, as a right to the use of a ditch for drainage through the land of another may be established by adverse user.—ROBERTS v. VON BRIESEN, Wis., 83 N. W. Rep. 755.

83. WATERS—Overflow Caused by Railroad—Liability of Company.—A railroad company in failing to construct a ditch to carry away surface water from plaintiff's land, after having filled a ditch constructed by him, is not liable for damages resulting from an extraordinary and severe storm, which would have produced the injury complained of if a sufficient ditch had been in existence.—KANSAS CITY, ETC. R. CO. v. WILLIAMS, I. T., 58 S. W. Rep. 570.

84. WILLS—Construction—Contingent Remainder.—Testator directed that after the death of his wife his estate should be divided between certain legatees equally, and that a certain sum be deducted from the share of one of the legatees, to be paid to a nephew. The share of any legatee dying before testator's widow was to pass to the issue of such legatee, and, failing such issue, to be divided among the surviving legatees. Held, that the legatees took a remainder contingent on their surviving testator's widow, since the will contained no words of gift to the legatees except those contained in the directions to the executors to divide, which being in the future, the gift also was future.—IN RE CRANE, N. Y., 58 N. E. Rep. 41.